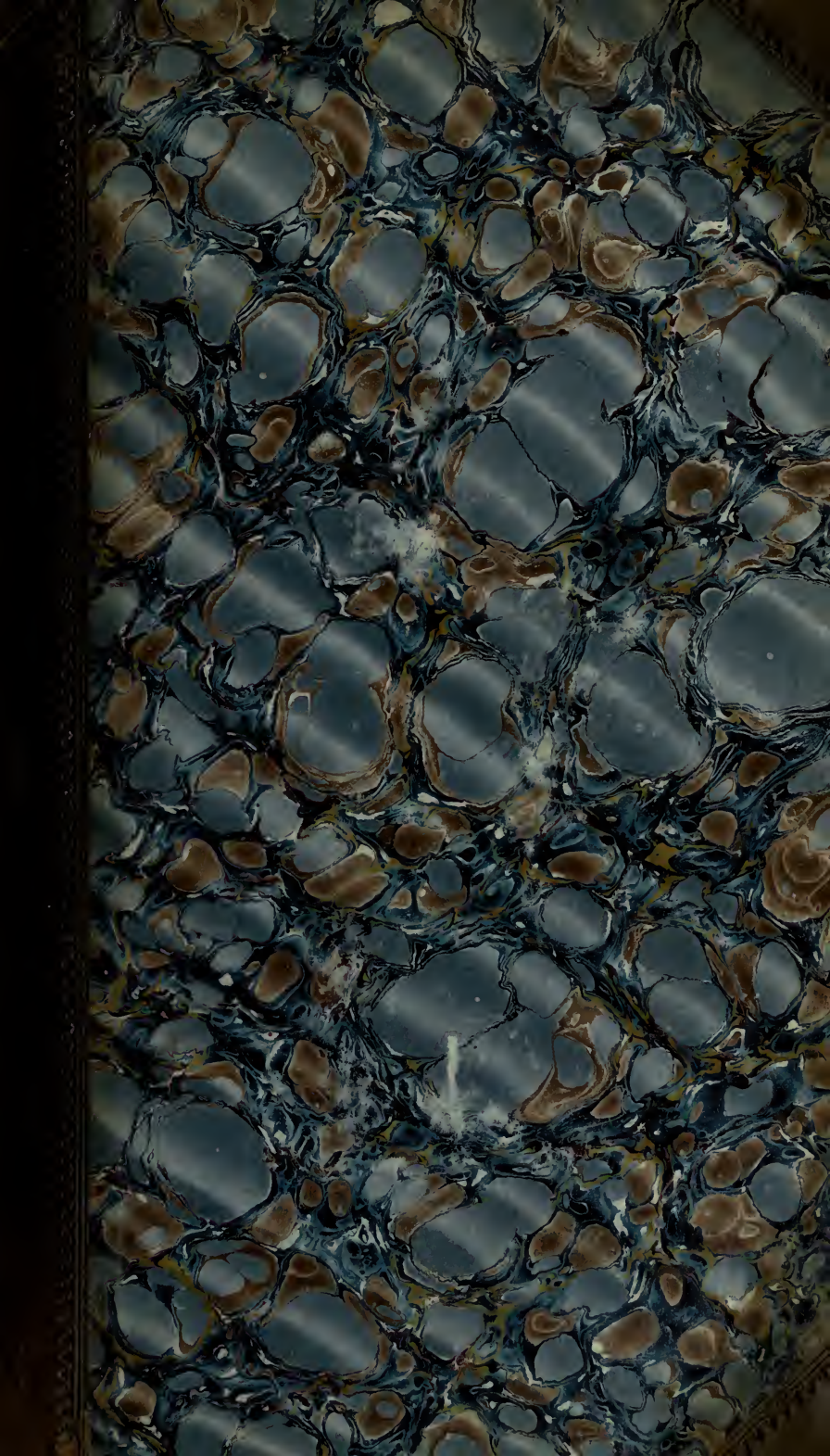

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A

TREATISE OF THE LAWS

FOR THE

RELIEF AND SETTLEMENT

OF THE

POOR.

By MICHAEL NOLAN,
OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

THE THIRD EDITION,
WITH CONSIDERABLE ADDITIONS.

IN THREE VOLUMES.

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1814.

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TO

THE THIRD EDITION.

THE Author has endeavoured to render this work less unworthy of the favourable reception it has obtained from the profession and the public, than it has been in former editions. The alterations and additions which are now made have so much encreased its size, that it was found advisable to separate the Appendix of statutes into an additional volume. Owing to these circumstances it became impossible to preserve the paging of the last edition, which was anxiously desired. The friendship of Messrs. Maule and Selwyn has enabled the author to insert all the judicial decisions upon his subject, from their valuable manuscripts, including those of the last term. A few which he did not receive in time to incorporate with the work, will be found prefixed to the first volume.

5. King's Bench Walk, Inner Temple,
December 28th, 1813.

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TO

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TO

THE FIRST EDITION.

THE importance of that system of our laws, which respects the civil œconomy and comforts of the poor is so obvious, that it is hoped an attempt to offer some facilities to persons concerned in the administration of them, will be received with indulgence.

For this purpose it has been thought convenient, instead of giving the numerous cases on every branch of the subject, to reduce the substance of the decisions into the form of a treatise. The words of the judgment of the court are preserved as much as possible, but it is disentangled from those circumstances of an individual nature, which could be of no use in illustrating the principle upon which the determination is founded. When, however, a more minute statement of the case seemed necessary, it has been given in the language of the report.

The present work differs, not only in its outline, from those of Dr. Burn, and Mr. Const, but also

in its general arrangement; and it will be found to treat of some subjects, which are either omitted altogether, or but slightly touched upon in those valuable productions.

The object has been not only to unfold the theory and doctrine of the law, but to supply in some degree the want of personal experience, by pointing out the manner in which that theory is to be applied in practice. The mode of proof, necessary to establish the different kinds of settlement, is set forth with some minuteness; and such a general statement is given of the manner of conducting appeals before courts of quarter sessions, as is consistent with the various rules of practice, which are different in different courts. An account is likewise added of the practice on the crown side of the court of King's Bench, as it respects the orders of magistrates removed thither by *certiorari*.

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TO

THE SECOND EDITION.

THE present Edition will be found to vary from the former in the following particulars. The arrangement in some parts of the work has been changed, with a view to a more perspicuous exposition of the subject. A considerable portion of new matter has been introduced, including a chapter upon acquiring a settlement *By paying Parochial Taxes.* The style and language of the work has been altered in various places, while the index has been enlarged considerably, and the collection of statutes in the appendix rendered more complete.

Such cases as have been judicially decided since the original publication of the work, have been inserted in their proper places, except the determinations of last Michaelmas Term, which are prefixed to the first volume. They are taken from a manuscript copy of Mr. East's notes, with which he kindly furnished the author, and are appropriated by suitable references to those parts of the book under which they should be arranged.

5. King's Bench Walk, Inner Temple,
Dec. 18. 1807.

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TO

THE SECOND EDITION.

CONTENTS

OF

THE FIRST VOLUME.

CHAPTER I.

Of the Manner of providing for the Poor previous to the Statute 43 Eliz. cap. 2. — — Page 1 to 6

CHAPTER II.

Of the local Divisions by which the Poor are to be maintained — — — — 7 — 39

CHAPTER II.—Part II.

Of appointing Overseers, and their Duties — 40 — 56

Of the Poor's Rate.

CHAPTER III.

Of making, allowing, and publishing the Rate — 57 — 60

CHAPTER IV.

Of the Time for which the Rate is to be made — 61 — 62

CHAP-

CHAPTER V.

Page

Of the general Purposes to which the Rate is to be applied — — — — — 61 — 66

CHAPTER VI.

Of Persons and Property to be rated — — 67 — 71

SECT. I. *Of rating Land, Houses, and Profits annexed thereto* — — — 71 — 78

SECT. II. *Incorporeal Hereditaments* per se 78 — 124

SECT. III. *Tithes* — — — 125 — 127

SECT. IV. *Coal Mines and Fossils* — 127 — 131

SECT. V. *Saleable Underwoods* — — 131 — 135

CHAPTER VII.

Of Property exempted by particular Statutes — 136 — 141

CHAPTER VIII.

Of the Rateability of personal Property — 142 — 146

CHAPTER IX.

Of the rateable Occupier of real Property — — 147

SECT. I. *Of the Occupation* — — 147 — 157

SECT. II. *Of the beneficial Occupation* — 157 — 175

SECT. III. *Of the Occupation of personal Property to render it rateable* — — 175 — 178

CHAPTER X.

Of Rating double — — — — 179 — 181

CHAPTER XI.

Property, in what Place rateable — 182 — 191

CHAPTER XII.

Page

Of the Principles upon, and the Proportions in which the Rate is to be made — — 192 — 209

CHAPTER XIII.

Of rating Parishes in Aid — — — 210 — 220

CHAPTER XIV.

Of levying and distraining for the Poor's Rate 221 — 235

CHAPTER XV.

Of ascertaining what Poor the Parish are bound to maintain — — — 236

Origin and History of the Law of Scotland 236 — 251

CHAPTER XVI.

Of the several Kinds of Settlements, and general Rules which govern them — — 252 — 257

CHAPTER XVII.

SECT. I. *Of Settlement by Marriage — 258 — 259*

SECT. II. *Of the Proofs necessary to establish a Settlement by Marriage — — 260 — 273*

CHAPTER XVIII.

Of the Settlement of legitimate Children by Birth 275 — 285

SECT. II. *Proofs necessary to support this Settlement — — — — 286 — 287*

CHAP-

CHAPTER XIX.

Page

Of the Settlement of illegitimate Children by Birth.
SECT. I. *Of the Settlement* — — 288 — 292
SECT. II. *Of the Proofs* — — 292 — 298

CHAPTER XX.

Of Settlement by Hiring and Service — 299 — 445
SECT. I. *Division of the Subject* — 299 — 301
SECT. II. *What Persons are capable of acquiring a Settlement by Hiring and Service* 301 — 303
SECT. III. *Of the Contract of Hiring* — 303 — 341
SECT. IV.—PART I. *Of the Year's Service* 341 — 398
SECT. IV.—PART II. *Of connecting Services under several Hirings* — — 399 — 413
SECT. IV.—PART. III. *Of Service with different Masters* — — — 413 — 418
SECT. V. *Of the Residence by, and Place in, which a Settlement is gained* — 418 — 432
SECT. VI. *Of the Proofs necessary to support this Settlement* — — — 432 — 445

CHAPTER XXI.

Of Settlement by Apprenticeship — — 446 — 550
SECT. I. *Division of the Subject, and general Rules respecting it* — — — 446 — 448
SECT. II. *Of the binding necessary to gain a Settlement by Apprenticeship* — — 449 — 474
PART II. *Of the Distinction between imperfect Contracts of Apprenticeship, and Contracts of Hiring and Service* — — 474 — 488
SECT. III. *Of discharging the Apprentice from his Indenture* — — — 488 — 505

SECT.

Page

SECT. IV. *Of the Service* — — 506 — 521
SECT. V. *Of the Residence by, and Place in, which an Apprentice acquires a Settlement* 521 — 530
SECT. VI. *Of the Proofs necessary to establish a Settlement by Apprenticeship* — 530 — 550

CHAPTER XXII.

Of Settlement by serving an Office.
SECT. I. *Of the Kind of Office* — — 551 — 558
SECT. II. *Of the Election, Service, and Residence* — — — — 558 — 563
SECT. III. *Of the Proofs necessary to establish this Settlement* — — — 563 — 566

IN-

INDEX

OF

THE NAMES OF CASES

CITED IN THE FIRST VOLUME.

A Page

Adams *v.* Arnold, 442
v. Ker, 531, 532, 534
Albrighton *v.* Skipton, 52
Allesbrook *v.* Roach, 533
Alsop *v.* Bowtrell, 297
Alton *v.* Elvetham, 424, 425
Amherst (Lord) *v.* Somers (Lord), 153, 167, 226
Anthony *v.* Cardigan, 302
Appotens *v.* Dunswell, 258, 259, 444
Ashburton *v.* Woodland, 440
Ashcroft *v.* Bertles, 499
Ashley's Case, 49
Atkins *v.* Davis, 69, 73, 80, 81, 82, 84, 88, 93, 129, 130, 131, 142, 143, 157, 158, 177, 182
Attorney-General *v.* Le Merchant, 543
v. Parker, 68
Aubrey *v.* Fisher, 134, 135
Ayr *v.* Smallpiece, 154

B Page

Balcetti *v.* Serrani, 534
Ballis and Church *v.* Attorney General, 546
Banbury *v.* Broughton, 285, 290
Barber's Case, 41
Barber *v.* Dennis, 508
Barnes *v.* Trompowsky, 531
Barnford *v.* Baron, 231
Bartlet *v.* Gawler, 543
Basset *v.* Basset, 540
Battye *v.* Gresley and others, 51, 457
Baxter *v.* Burfield, 509
v. Faulam, 461
Baylis *v.* Attorney-General, 546
Beaumont *v.* Fell, 546
Bell *v.* Oakley, 233
Bentley *v.* Cooke, 269
Berkhampstead *v.* St. Mary, North Church, 258, 276
Berryman *v.* Wise, 535

	Page
Birt *v.* Barlow,	268
Bisham *v.* Cock,	552. 556
Bishop's Hatfield *v.* St. Peter's,	414
Bisset *v.* Caldwell,	233
Blurton *v.* Toon,	532
Bolton *v.* Gladstone,	497
Boreham *v.* Waltham,	290
Brazier's Case,	436
Breton *v.* Cope,	531
Bridewell *v.* Clerkenwell,	9
Brightwell *v.* Westhally,	401
Brookbank *v.* Woodley,	533
Brown's Case,	244
Brune *v.* Rawlings,	533
Buckley *v.* Smith,	531
Buckrow's Case,	539
Bugden *v.* Ampthill,	278. 282
Bunting's Case,	497
Burclear *v.* Eastwoodhay,	16
Burdon *v.* Ricketts,	445
Burleigh *v.* Stubbs,	544
Bute (Lord) *v.* Grindall,	39. 70. 79. 82. 85. 147. 150. 155. 181. 169. 173. 179. 157. 205. 226
Butler *v.* Cobbet,	58

C

Caistor *v.* Eccles,	509
Carey *v.* Pitt,	533
Case *v.* Stephens,	67
Case of the Borough of Warwick,	54
Case of Parish of St. Peter's and St. Paul's,	214, 215
Case of the Overseers of Weobly,	49
Case of St. Rumbald's Parish,	214, 215
Case of the Borough of Marlborough,	215, 216
Case of Chesterfield,	451
Case of the Flad Oyen,	497
Cates qui tam *v.* Winter,	543
Catten *v.* Berwick,	40, 41
Cawthorne *v.* Campbell,	47
Chamberlain *v.* Porter,	457
v. Staunton,	534
Charlwood *v.* Best,	227
Cheney's Case,	546
Chettle *v.* Pound,	538
Chesham *v* Missenden,	304
Chichester *v.* Phillips,	497
Chilmerton and Flagg,	35
Clavely *v.* Burton,	285
Clerk *v.* Heath,	539
v. Wright,	298
Clerkenwell *v.* Bridewell,	419. 522
Clifton *v.* Churcham,	10
v. Walmsley,	546
Cobbet *v.* St. Mary, Lincoln,	59. 216
Coghlan *v.* Williamson,	531
Coker *v.* Guy,	546
Cold Ashton *v.* Woodchester,	557
Collins *v.* Jessot,	272
Cook *v.* Sholl,	497
Cooke *v.* Hundredors of Pimhill,	11
Coombe *v.* Westwoodhay,	318. 321
Cox *v.* Whalley,	440
Coxwell *v.* Shillingford,	274
Cripplegate *v.* St. Saviour's,	287
Crompton *v.* Bearcroft,	266
Cross *v.* Salter,	273
Cuerden *v.* Leland,	461
Cunliffe *v.* Sefton,	532
Cunmer *v.* Milton,	274

D

Dacosta *v.* Pym,	533, 534
v. Villa Real,	273
Daniel *v.* Cooke,	264
Davis, Ex parte,	499

Page
Davis v. Dinwoody, 269
Dawson v. Fowle, 40
Deacon v. Cock, 439
Dean v. Linton 9. 248
Denn v. Spray, 488
Ditton's Case, 495, 496
Doe ex dem. Freeland v. Burt, 546
Doe on the dem. of Small v. Allen, 548
Dolting v. Stokelane, 9, 10, 11. 13. 16. 38
Duchess of Kingston's Case, 270. 273. 497
Duhamel's Case, 496
Duke of Portland's Case, 169
Dumbelton v. Beckford, 278
Dunsford v. Ridgwick, 317
Durrant v. Boys, 62. 205

E

Earby, Sir Anthony's Case, 67, 68. 70. 82
Eardisland v. Leominster, 401. 414
East India Company v. Skinner, 221. 232
Eastland v. Westhorsley, 363
Eastwoodhey v. Westwoodhey, 282
Eccleston v. Speke, 544
Eckersall v. Briggs, 85. 88. 153. 167
Eddington v. Borman, 137
Edgecomb v. Sparks, 232
Edwards v. Harben, 231
Edwin v. Thomas, 488
Elsing v. County of Hereford, 290

F

Fachina v. Sabine, 436
Farr v. Price, 457
Farringdon v. Witty, 301. 427
Fassel's Case, 11
Fasset v. Brown, 531
Ferrers (Lord) v. Shirley, 532, 533
Feversham v. Graveney, 423
Filmer v. Gott, 548
Fettleworth v. Pullborough, 551. 558, 559
Fletcher v. Ingram, 54
v. Wilkins, 230
Fotheringham v. Greenwood, 438
Foxcraft's Case, 296
Freeland v. Burt, 546

G

Ganer v. Lady Lanesborough, 273. 298
Gatton v. Milwich, 552. 556. 557
Gaudy's Case, 268
Gill, ex parte, 488
Godfrey v. Norris, 532
Goodier v. Lake, 540
Goodtitle v. Braham, 533
Gordon's (Col.) Case, 535. 543
v. Falkner, 231, 232
v. Secretan, 538
Goring v. Moltsworth, 423
Gorton v. Falkner, 231, 232
Goslin v. Hardin, 185
Goss v. Tracey, 532
Gould v. Arthur, 126
v. Jones, 532
Green v. Proud, 12
Greenaway v. Earl of Kent, 135
Greenwich v. Longdon, 421
Gregory Stoke v. Pitminster, 305. 311
Grellier v. Neale, 531. 534
Grendon v. Underwood, 125

Page
Grey v. Cookson, 453. 492. 499. 504. 508
Grimwade v. Stephens, 292
Guevas v. Kelynac, 126
Gunnis v. Erhart, 546

H

Hampton v. Lammas, 228
Hanmere v. Ellesmere, 401
Hands v. James, 534
Hard's Case, 277
Hardingham v. Brisley, 240. 246
Hardwell v. Jerman, 442
Harper v. Carr, 224. 226, 227
Harrow v. Edgeware, 254
Havelock v. Rockwood, 497
Harvey's Case 497
Hart v. Horn, 441
Hawksworth v. Hilary, 493. 495
Haydon v. Gould, 272
Hearne v. Drake, 509
Helsington v. Over, 556, 557
Henley v. Chesham, 269
Herlakenden's Case, 132
Hilton v. Pawle, 8. 37
Holeford v. Copeland, 88. 107. 167, 168. 172
Holland v. Heale, 185
Hollidge's Case, 68
Holmes v. Ponten, 531
Holt v. Ward, 272. 301
Holy Trinity v. Garsington, 400. 552. 556. 559
v. Shoreditch, 509
Hooper v. Carr, 37
Horner v. Liddiard, 266
Horsham v. Shipley, 317
Howard v. Shipley, 438
Hubbard v. Penrice, 40
Hull's Case, 58. 82
Hume v. Burton, 273
Hutchins v. Chambers, 228. 232, 233, 234

I

Page
Ilderton v. Ilderton, 266

J

Jeffrey's Case, 68
Jenkin's Case, 215
Jones v. Bow, 497
v. Mason, 532
v. Maunsell, 79, 80, 81. 150. 153. 158. 173. 205. 226
v. Newman, 546

K

Kemp v. Spence, 75. 79. 136. 196. 198.
Kenward v. Knowles, 48
Kidd v. Rawlinson, 231
Kingston's (Duchess of), Case, 270. 273. 497

L

Lane v. Cobham, 30. 39
Lapthorne's Case, 135
Leader v. Barry, 268. 270
Lee v. Gansel, 437
Leith v. Post, 538
Leyfield's (Dr.) Case, 540
Liddleston v. Mayor of Exeter, 11. 38
Lifford Robert's Case, 132
Llandverras v. Northop, 38
Lomax v. Holmden, 296
Lothian v. Henderson, 497
Lothsome v. Sheriff hales, 8. 560
Low v. Burdon, 124
Lowess v. Lanstephen, 422
Lowndes v. Horne, 82. 127. 136
Lynch v. Clerk, 540

M Page

Macpherson *v.* Thoytes, 533
Manby *v.* Scott, 273
Marsh *v.* Colnett, 538
Master *v.* Miller, 509
Masters *v.* Child, 289
Mather *v.* Neigh, 267
May *v.* May, 297
Meddlicott *v.* Joyner, 540
Melville's (Lord) Case, 440
Meres *v.* Ansell, 546, 547
Milward *v.* Caffin, 147. 226. 228
Missenden *v.* Chesham, 424
v. Grimsfield, 257. 523
Monroe *v.* Twistleton, 438
Moorewood *v.* Wood, 533
Moyse *v.* Cocksedge, 232, 233, 234
Much Waltham *v.* Peram, 290

N

Negus *v.* Reynal, 540
Newbury *v.* St. Mary's, 451
Newton *v* Young, 228
Nicholas *v.* Elliott, 185
v. Walker, 8. 226
Notton *v.* Royston, 513
Nutting *v.* Jackson 224

O

Ormichund *v.* Barker, 436
Osbourn *v.* Hosier, 533

P

Parish of Hardingham *v.* Parish of Brisley, 240. 246
Parke *v.* Meares, 531
Passal *v.* Godsal, 536
Patchett *v.* Bancroft, 228
Powlet *v.* Burnham, 306. 367. 389
Peart *v.* Westgarth, 16. 18. 22. 35. 37, 38. 226

Page

Pendrel *v.* Pendrel, 295
Pendock *v.* Mackinder, 137
Pepperharrow *v.* Frenchman, 318
Peterborough (Lord) *v.* Mordant, 540
Philips *v.* Hunter, 266
Poole, Sir William's, Case, 544
Pordage's Case, 47, 48
Portland's Case, (Duke of) 169
Powell *v.* Ball, 127
v. Blacket, 531
Price *v.* Blackbourn, 531, 532
Priestly *v.* Hughes, 266
Pritchard *v.* Symonds, 540. 543
Prudham *v.* Phillips, 497

Q

Queen *v.* Barking, 78

R

Radwell's Case, 297
Rann *v.* Pickings, 136
Ratcliffe *v.* Chaplin, 488
Raymond *v.* Botolph's, Aldgate, 47
Regina *v.* Barking, 133
Clifton 274
Grey, 290
Icleford, 290
Rutter, 495
Searle, 50. 52
Thursley, 502. 510
Reid *v.* Passer, 269. 272
Roach *v.* Garvan, 270. 273
Robinson *v.* Dryborough, 457
Robson *v.* Hyde, 163
Rowls *v.* Gells, 74. 82, 83. 87. 128. 131. 155. 158. 169. 179
Rudd's Case, 438

Page

Rudd *v.* Foster, 9. 39. 226
Morton, 12
Rex *v.* ——, 83
Rex *v.* Aberavon, 80. 149. 173
Abergwilly, 444
Aberystwith, 148
Ackley, 318
Adson, 320. 414
Agar, 158. 160. 163, 164. 174. 193. 202. 205
Aicles, 509
Aire and Calder Navigation, 60. 74. 80. 95. 121. 186.
Alberbury, 82. 129. 158. 179
Alberton, 295
Allendale, 302
All Cannings, 552. 556
All Saints, Hereford, 476. 488
All Saints, Derby, 45. 435. 455
Alton, 370. 404. 480
Alveley, 388
Ambleside, 145. 176
Amies, 495. 497
Andover, 67, 68. 144. 176. 189
Anon, 59
Arlington, 340. 350
Arnold, 49
Ashton Underhill, 420
Astley, 289
Asthon, 420
Atherton, 322, 323
Atkins, 58
Audley, 57. 192. 207
Austrey, 499, 500. 512. 518
Aynho, 400
Aythrop Rooding, 240. 254. 258
Rex *v.* Badby, 453. 544
Bagworth, 401
Bank Newton, 302. 321

Page

Rex *v.* Baptist Mill Company, 74. 84. 86. 129. 131. 155
Barking, 144. 179
Barmby in the Marsh, 526. 529
Barnsley, *Addend.* xxxv.
Barnstable, 58. 207
Barrat, 60
Bartholomew, Cornhill, 357
Bartholomew's Hospital, 160
Bartlett, 150
Barton Tusse, 276
Bath Easton, 305. 324. 423
Bath, (Corporation) 68. 74. 183, 184
Beccles, 353. 417
Bedall, 272. 295. 298
Bedworth, 159. 204
Beeding, otherwise Seal, 23. 27. 36. 78
Beeston, 55
Bell, 75. 80. 174
Benn, 223, 224, 225
Berkswell, 270
Berwick St. John, 326
Besland, 46
Bidworth, 127
Bilton, 445. 534
Binegar, 270
Birdbrooke, 232
Birmingham, 305. 328. 336. 338. 358, 359. 480
Bishops Hatfield, 338
Borough Fen, 211. 214, 215, 216. 223
Bow, 320. 553. 557
Bradford, 466. 473
Bradninch, 331. 508. 516. 521
Bradstone, 507. 514
Bramley, 269. 297, 298

Rex

Page
Rex v. Brampton, 267. 272. 388. 392. 394
Bray, 349
Bridgewater (Overseers) 51. 54
Brighthelmstone, 420. 422. 523, 524
Brightwell, 414
Broadhembury, 285
Brograve, 79. 193. 206
Brown, 129. 147. 156. 180, 181. 294
Buckington, 498, 499
Buckland Denham, 337. 480
Bucklebury, 287
Burbach, 487, 488
Burder, 38. 50
Burton Bradstock, 525
Bury, 443
Butler, 36. 40. 43. 51. 208
Rex v. Canterbury, 144. 146. 176, 177. 189. 194
Cardington, 80, 81. 92. 182. 187
Carlton, 259
Carlyon, 83, 84. 122. 126, 127. 142. 145. 185. 190
Carsham, 381
Castle Church, 382
Castell Careinion, 438
Castleton, 525, 526. 541. 543
Cator, 533
Catt, 126. 152. 161. 164
Caverswall, 371. 405.
Chadderton, 444
Channel, 509
Chalbury, 453, 454
Chardstock, 41. 44. 47
Charles, 496. 505, 506. 524. 526, 527
Chertsey, 304
Page
Rex v. Chester, 498
Chichester, 63, 64
Chidingstone, 258
Chilviger, 269
Chipping Warden, 447. 503
Chirck, 507. 512, 513. 529
Christ Church, 360
Christowe, 520, 521
Churchwardens of Andover, 67, 68, &c.
Cirencester, 522, 523
Clapham, 500. 507. 510
Clapp, 68. 122
Clare, 329. 333
Clarendon Park, 211
Clayhydon, 381
Clayton Le Moore, 445. 543
Clent, 301
Clerkenwell, 51. 141. 192
Clifthydon, 522
Clifton, 45, 46. 455
Clifton upon Dunsmore, 468
Cliviger, 279
Collingbourn, 280. 493
Collinson, 146. 191
Coltishall, 480
Corsham, 345. 381. 398
Count de Castlemain, 437
Cowhoneybourne, 284. 303 307
Cozens, 222, 223. 225
Crediton, 507. 512. 518
Creech, 286
Creech St. Michael's, 293. 443
Cromford, 451. 477
Crosby, 438

Page

Rex v. Croscombe, 399. 401. 407. 426, 427. 435
Cunningham, 127, 128. 131
Rex v. Dalton, 535
Darlington, 176. 193. 285
Davis, 494, 495, 496
Dedham, 328. 330. 335
Denham, 11, 12, 13. 15. 38. 45. 415. 431
Ditchingham, 450. 454. 461
Donnovan, 153
Dunton, 313
Dursley, 175, 176, 177. 193, 194
Rex v. Eakring, 498, 499. 512, 513
East Bridgeford, 507. 509. 513
East Church, 214. 218
East Ilsley, 424
East Kennet, 381. 397
East Knoyle, 540. 544
East Shefford, 345. 350
Eaton, 348
Eccleston, 475. 483. 488
Ecclesal, 500
Edgeworth, 280
Edmonton, 264. 269
Edwards, 58, 59. 259. 437
Eldersley, 304. 424
Ellis, 74. 81
Ellisfield, 406
Elstack, 304. 328, 329
Eltham, 259
Empingham, 339
Eriswell, 442. 444
Erith, 293. 444
Essex (Inhab.) 63
Evered, 453. 499
Everton, 278

Page

Rex v. Eyeford, 13, 14. 35. 45
Eyles, 152, 153, 154
Eyre, 117. 174
Rex v. Fairfax. 70
Ferry Frystone, 444
Field, 152
Fifehead, Magdalen, 399. 406
Fillongley, 388
Flag, 15
Fleet, 453
Fisher, 52
Folly, 59
Foreign of Walsall, 34. 36
Forrest, 44. 50. 52. 59
Fremington, 508. 510. 521. 523
Friendsbury, 423
Frome Selwood, 366
Furness, 493
Rex v. Gainsborough, 453. 455. 523
Garden, 65
Gardner, 68. 147. 154. 162. 196. 204, 205
Gately, 488
Gayer, 47. 53
Gibbs, 82
Gill, 494, 495. 499
Gisburn, 439
Gloucester (Mayor), 61. 63. 65
Goodcheap, 65
Goodneston, 351
Governors of St. Mary Magdalen, Bermondsey, 439
Grafton, 14
Grantham, 341. 350. 381. 391. 397. 405
Great Bookham, 301. 423
Great Chilton, 369. 401. 411. 428

Rex

Page
Rex v. Great Marlow, 36. 50. 52. 54
Greenwich, 443
Grendon Underwood, 314. 346. 378. 415
Gresham, 371
Grey, Jane, 290
Gully, 438
Rex v. Haddenham, 277
Hales, 307. 325. 435
Hales Owen, 496, 497
Halifax, 280
Hammond, 532
Hampreston, 329. 332
Hamstall Redware, 59. 456. 534
Hanbury, 301. 332. 347. 364. 384
Harberton, 260. 500, 501, 502
Hardingham, 363. 388
Hardhorn, 344. 363. 370. 398. 416
Hardwick, 281. 283. 440, 441
Hardy, 207
Harman, 45. 54
Harpur, 54
Harris, 41, 42
Harwood, 319, 320
Haughton, 317
Headcorn, 270
Heaseman, 494, 495, 496
Heath, 282
Heaton, 286
Hedsor, 260. 301. 423
Helling, 50
Hensingham, 302. 307
Highnam, 458. 477, 478. 480. 488. 547
Hill, 144
Hilton, 288
Hinchley, 455
Hindringham, 499. 505
Hinxworth, 271
Page
Rex v. Hitcham, 305. 314. 475
Hoddesden, 321
Hodnett, 264. 272
Hogg, 77. 142. 144, 145, 146, 147
Holbeach, 211. 214. 219
Holbeck, 530
Holbeck in Leeds, 457. 530
Holy Trinity in Wareham, 307. 433. 443
Holy Trinity in the Minories, 500. 508. 511. 514. 517. 520, 521
Hope Mansell, 552
Horton, Sir Watts, 12. 17. 26, 27. 35, 36
Horwick, 336. 341
Houlditch, 49. 54
Howard, 146. 188. 191
Hull Dock Company, 73. 136. 166
Hulland, 422
Hurdis, 153. 170. 173. 175
Rex v. Icleford, 290
Ideford, 511
Ilam, 321
Ilminster, 554
Ingworth, 277
Ipsley, 288
Islip, 321. 348. 360, 361. 364
Iveston, 422
Ivinghoe, 352. 417
Johnson, 494. 496
Jolliffe, 80. 150
Jones, 38. 50. 71. 142. 145, 146. 174. 189
Justices of Bedfordshire, 10. 15
Justices of Devonshire, 502
Justices of Dorchester, 59

Page
Rex v. Justices of Glocester, 37. 246
Justices of Middlesex, 10. 16, 17. 36. 224
Justices of Peterborough, 12. 15. 35
Rex v. Kea, 298
Kempson, 295
Kenilworth, 388. 396
Keynsham, 461
Kilderby, 440
King's Norton, 301. 338
King's Pyon, 386. 400
Kingsweare, 476
Kingswinford, 337, 338
Kirdford, 439, 440
Kirkby Stephen, 34. 540
Knightly, 214, 215
Kynaston, 59
Rex v. Ladock, 416. 424
Laindon, 448. 475. 478. 481. 547
Lakenham, 207
Lambeth, 125, 126
Landillow, 63, 64. 151. 155
Langamarch, 107
Langhem, 498. 500. 508. 510
Lanvair, 457
Leeds and Liverpool Canal Company, 77. 138. 186. 187
Leigh, 26, 27, 28. 35. 38. 271. 374. 387.
Leighton, 466. 506
Lidney, 322
Little Bolton, 305. 475. 481, 482. 488. 544
Little Glen, 215, 216. 219
Little Lumley, 439
Littleport, 61
Liverpool, 71. 146. 191. 194. 552. 556, 557. 559

Page
Rex v. Llanvair Dyffryn, 457, 458
London (Mayor), 68. 73. 80. 155, 186
Long Buckby, 545
Long Whatton, 307. 325. 434
Long Wittenham, 276. 285
Loxdale 45. 49
Lowther, 317
Lubbenham, 270
Luckington, 274
Luffe, 294, 295, 296, 297, 298
Luffington 472
Lyth 307. 311. 323 434. 445
Rex v Macclesfield, 304. 306. 315. 337
Macdonald (Sir A.) 74. 81. 119. 177
Maddington, 347. 360
Maidstone, 295, 296. 345. 368. 375
Margram, 450. 476
Marlborough, 388
Martham, 338. 481. 488
Marton, 321
Mast, 144, 145, 176. 196, 197, 198. 209
Mathews, 68. 153. 169, 170. 173
Mathon, 288, 289
Mawnam, 450
Melborne, 555
Mellingham, 450
Merchant and Allen, 51, 52
Merevall, 55
Merfield, 132. 202
Mersham, 553, 554
Metheringham, 540. 544
Micklefield, 63

Page
Rex v. Middlezoy, 531. 535, 536. 540. 544
Mildenhall, 344. 355. 370
Milland, 211, 212
Miller, 73
Milwich, 306. 382
Minchin Hampton, 79. 135
Mitcham, 329
Moore, 47
Morris, 11. 35. 45, 46. 49
Mortlake, 278
Munday and others, 154. 162. 173
Mursley, 305. 318, 319
Rex v. Navestock, 329
Nether Heyford, 354
Nettleborough, 392
Newcombe, 60. 226
Newell, 16, 17. 22. 25. 38. 192
New Forest, 303
Newstead, 320
Newton, 318
Newton Toney, 271. 329
New Windsor, 322. 326, 327
Nicholson, 78. 81. 107. 121. 184
North Basham, 366, 367. 384
North Bedburn, 542
North Cray, 395
North Owram, 462
North Nibley, 337
Northfield, 263
Norton, 303, 304
Notton, 500
Nuneham Courtney, 444
Nuttley, 443
Nympsfield, 301. 423
Rex v. Odiham, 330
Offchurch, 279
Offerton, 511. 518
Oulton, 276
Page
Rex v. Over, 339, 340
Overnorton, 307. 326. 328. 369. 411
Overton, 400, 401
Ozleworth, 360. 388
Rex v. Page, 74. 80. 98. 121. 186
Palmer, 29. 33. 37
Pardy, 38
Parrot, 89. 127. 147. 158, 159
Pateman, 47
Paulsperry, 276
Pearce, 543
Peck, 498
Pendleton, 308. 434. 531
Percival, 217. 219
Peterborough, 12. 14. 59
Petham, 509
Piddletrenthide, 181. 499. 502. 515. 524
Portsea, 442. 463. 488
Potter Heigham, 361, 362. 366
Preston, 263, 264. 362. 367
Price, 49
Priddle, 437
Prosser, 439
Prowse, 47
Pucklechurch, 325. 328, 329, 330.
Rex v. Rainham, 475. 479
Reading, 298
Rebowe, 79. 90. 187
Reily, 438
Ribchester, *Addend.* xxxi.
Rice, 40. 42
Richmond, 356
Rickinghall, Inferior, 304. 312
Ringwood, 145, 146. 175. 190
Roach, 278. 282, 283, 284
Rex

Page
Rex v. Rochdale, 74. 185
Rochester (Bishop of), 79. 84. 86 179
Rodd, 145
Ronton Abbey, 13, 14, 15, 16. 35
Ross, 371
Rotherhithe, 64
Rudgely, 271
Rufford, 10. 55
Rushall, 304. 316. 345. 381
Rusholme, 339. 359
Ryton, 260. 538
Rex v. Sainsbury, 213
Saltern, 452. 456. 437. 535
Salter's Sluice Navigation, 68. 74. 165
Samborn, 548
Sandford, 520. 523, 524
Sandwich, 206. 208
Scott, 137
Scammonden, 548
Sculcoates, 74. 165
Seagrave, 368. 380
Searle, 50, 51
Seaton and Beer, 307. 328. 331
Sellers, 209
Severn and Arnold, 11. 16. 49
Seammonden, 540
Shalfleet, 144. 145. 193, 194
Sharrington, 360, 361. 425
Shebbear, 500. 504. 508. 511. 515
Sheepshead, 498. 507, 508
Sherborne, 144. 176
Sherringbrooke, 49
Shinfield, 304. 314. 370. 483, 484. 488
Showler and Atter, 10
Silchester, 270

Page
Rex v. Silton, 277
Simpson, 42
Skingle, 126. 136. 197
Skiplam, 320
Smith, 259
Smerden, 510. 525. 529
South Lynn, 258. 439
Southwark, 147. 157
Sowerby, 278. 284
Sowton 241
Sparrow, 44. 49, 50. 52. 55
Spawnton, 499, 500
Spitalfields, 288
Spotland, 524, 525
Rex v. St. Agnes, 74. 84. 128. 155. 304. 358
St. Andrew's, Holborn, 359. 419. 421. 428
Rex v. St. Bartholomew's Hospital, 160
Bartholomew's, Cornhill, 357
Botolph's, Bishopsgate, 248. 256. 259. 458
Botolph's, 275
Bride's, 295
Rex v. St. Devereux, 269. 272
Rex v. St. Ebbs, 322
Rex v. St. George, 49. 62
George's, Hanover Square, 508, 509, 510. 523. 526
George, Middlesex, 139
Giles, 411
Giles in the Fields, 276
Giles, Reading, 307. 427
Rex v. St. Helen's, Worcester, 211. 215
Helen's, Stonegate, 512. 518
Helen's, 530

Rex

Page
Rex v. St. Helen's, 216. 542
Rex v. St. James, in Bury St. Edmonds, 425
John's, Maddermarket, 141, 142. 188. 190
Rex v. St. Lawrence, Winchester, 440
Luke's, 147. 160. 196. 204
Luke's Hospital, 153
Rex v. St. Margaret's, Lincoln, 451, 452
Margaret's, Leicester, 55
Mary, Cardigan, 277
Mary's, Guildford, 311
Mary the Less, 148. 153
Mary, Lambeth, 271. 345. 357. 359. 510, 511. 521
Mary in Marlborough, 220
Mary's, Reading, 457
Mary Kallendar, 476. 499. 501. 511
Mathew's, Bethnal Green, 256. 274, 275. 285. 467
Mathew's, Ipswich, 304, 305. 310
Michael's, 57
Michael's, Bath, 443. 543
Rex v. St. Nicholas, Gloucester, 75. 78. 196
Nicholas in Nottingham, 452, 453
Rex v. St. Olaves, 524
Olaves, Jewry, 524
Rex v. St. Paul's, Bedford, 507. 509. 550
Peter's, 297. 453
Page
Rex v. St. Peter's, Chester, 461
Peter's in Oxford, 241. 306. 419. 421. 424
Peter's on the Hill, 452. 524
Peter's, Dorchester, 334
Peter's, Worcestershire, 269. 288
Peter's, Mancroft, 317. 344, 345. 376. 381
Peter and St. Paul, 27. 290
Petrox, 454. 497
Petrox in Dartmouth, 452. 466
Philip in Birmingham, 362. 365
Rev v. St. Sepulchre's, 433. 443. 540
Staffordshire Navigation, 74. 81. 102. 121. 166. 186
Standon, Massey, 319 321
Stanford, 511
Stannington, 302
Stanwix, 283
Startifant, 144
Stockbridge, 324
Stockland, 269, 270. 509
Stokesley, 309
StonehouseBridge, 138
Stotfold, 52
Stowmarket, 304. 312
Stratford-upon-Avon, 527, 528
Stratton, 450
Stretton, 280
Stubbs, 44. 46. 50
Sudbrooke, 368. 378. 380
Sulgrave, 336. 355. 365. 407. 426

Rex

Page
Rex v. Sutton, 301. 304. 360, 361. 401. 409. 425
Syderstone, 320
Rex v. Tamworth, 14, 15. 38
Tarrant, 260
Taunton, 493
Tavistock, 507, 508. 516
Taylor, 437
Telscombe, 215
Terrington, 442
Terrot, 153. 158. 167. 169
Tewksbury (Trustees, &c.) 150
Thames Ditton, 310
Thatcham, 425
Thistleton, 345. 374. 381. 418
Thursley, 500
Titchfield, 425. 501. 526
Tolishunt Knights, 325. 329. 333. 345
Tolpuddle, 181
Toms, 127. 137. 179
Topcroft, 535
Topham, 127. 174, 175
Topsham, 525, 526. 528
Tottington Lower End, 279
Towcester, 271
Tunstead and Happing, 68
Turner, 125. 151. 174
Twitty, 42
Tynemouth, 91. 153. 187
Rex v. Uffculme, 68. 175. 196. 226
Ullesthorpe, 270
Ulverstone, 270. 321. 341
Under Barrow and Bradley Field, 400, 401
Undermilbeck, 353. 382. 424
Page
Rex v. Upwell, 381. 398
Uttoxeter, 15, 16. 19. 22. 24. 59. 254
Rex v. Vandeleer, 497
Vandewall, 81, 82. 179
Rex v. Waldo, 160
Walpole, St. Peter's 283
Walton, 308. 463
Wantage, 466. 544. 553. 556
Warner, 38. 47
Warley, 445
Watson, 24. 26, 27. 35. 38. 72. 79, 80. 108. 149. 152. 154. 259. 543
Wavell, 63
Weddington, 447. 499, 500
Welbeck, 11. 13, 14
Welch and others, 63
Wellford, 387. 393
Weobly, 49. 58. 207
Westerham, 259
Westerleigh, 339. 352
Westgarth, 15. 37
Westmeon, 394
Westwell, 322
Weyhill, 307. 309
White, 42. 68. 78. 145. 176. 188. 190. 193, 194
Whitechurch, Canonicorum, 314. 450. 476. 488. 552. 558
Whitley, 441
Whitney, 144. 146
Whittlesea, 552, 553. 555
Whittlebury, 341. 345. 379
Whixley, 286
Wickham, (Corporation,) 68. 80.
Wilsborough Green, 258, 259
Wincaunton, 304. 328
Rex

Page
Rex v. Winchcombe, 305. 323. 339
Winterbourn, 552. 559
Wintersett, 304. 316. 328 335. 345 361. 369. 378. 415
Winwick, 456. 534
Witton cum Twambrooke, 259. 277. 279
Woburn, 281. 284. 438. 440, 441
Woodford, 260. 286. 439
Woodland, 129. 158
Woodward, 158
Woolstanton, 453, 454
Worfield, 305. 324, 325
Worsfield, 314
Wrexham, 192
Wrington, 333, 334. 336. 408
Wyke, 289
Wymondham, 45
Rex v. Yarmouth, 461

S

Sackeverell v. Sackeverell, 297
Salford v. Storeford, 457
Semple's Case, 11
Seymour, Sir Edward's Case, 540. 544
Sheen v. Godalming, 368. 383
Simpson v. Martopp, 232
Skillington v. Norton, 10. 16
Small v. Allen, 548
Smelting Company v. Richardson, 74. 128. 144, 154
Smith v. Birch, 450
South Carney v. Coultsbourn, 319
Spencely v. De Willot, 443
St. Benedict v. St. Peter's, 212. 216, 217
St. Cuthbert's v. Westbury, 522, 523
Page
St. George's v. St. Catherine, 276
St. George v. St. Margaret's, Westminster, 295
St. Giles v. Eversley, 257. 274
St. Giles v. St. Margaret's, Westminster, 258
St. John Baptist and St. James, 524
St. Luke's v. St. Leonard's, 512, 513
St. Leonard's, Shoreditch, (Case of,) 143
St. Mary, Colechurch, v. Radcliffe, 512. 524, 525
St. Mary v. St. Lawrence, 552. 557
St. Maurice v. St. Mary Kallender, 400. 552. 556, 557. 559, 560
St. Michael's in Norwich v. St. Mathew's, Ipswich, 283
St. Nicholas v. St. Peter's, 240. 451
St. Olave's v. All Hallows, 509
St. Peter's in Oxford v. Chipping Wycomb, 424
St. Petrox v. Stoke Fleming, 501. 509. 521
Stampe's Case, 41
Standen v. Standen, 269. 272. 297
Stanger v. Searle, 533
Stapylton v. Stapylton, 297
Staughton v. Reynolds, 41
Stead v. Heaton,
Steel v. Houghton, 4. 6. 240, 241
Stephenson v. Holditch, 496
Stevens v. Evans, 61. 221, 222
Stevens v. Moss, 297, 298
Stiles v. West, 273
Stone v. Grubham, 534
Stonehouse-bridge, Case of, 138

Page

Storey v. Robinson, 231
Stoke Fleming v. Berry Pomroy 525, 526
Stretton v. Norton, 259
Strutt v. Mellish, 540
Stutter v. Freston, 40, 41
Suckley v. Whitborn, 244. 246. 290
Swan v. Broome, 51
Swire v. Bell, 532

T

Talbot v. Hubble, 213
Talbury v. Foster, 554
Tawney's Case, 57. 64, 65
Taylor v. Cole,
Taylor v. Hague, 458
Temple v. Prescott, 391
Tewkesbury v. Twining, 289
Theed v. Starkey, 67
Thomas v. Thomas, 546
Thompson v. Jones, 536
Thompson v. Saul, 295
Thurston v. Delahay, 540
Tillard v. Shebbear, 490
Titchfield v. Milford, 446
Tracey v. Talbot, 39. 61. 152. 227
Tynton v. King's Norton, 275

U

Under Barrow and Bradley Field 400
Underhill v. Durham, 540

V

Valentia's (Lord) Case, 297
Villiers v. Villiers, 540
Vinkeston v. Ebden, 11. 16

W

Waite v. Stokes (Inhabitants), 51
Waldron's Case, 12

Page

Wallis Adm. v. Hewit 221
Wallis v. De Lancey, 532
Walpole (Lord) v. Cholmondeley (Lord), 546
Walton v. Tryon, 132. 135
Wandsworth v. Putney, 305. 322. 327
Ward v. Brampston, 40
Warner's Case, 40
Watkins v. Edwards, 493, 494
Watson v. Tryon, 202
Weld v. Chamberlain, 272
West v. Davis, 544
Westbrooke v. Strutville, 272
Westbury v. Coston, 290
Weston v. Cowledge, 188
Weston Rivers v. St. Peter's, Marlborough, 242. 248
Whiskens v. Davis, 124
White's Case, 436
Whitechapel v. Stepney, 285. 288
Whitfield v. Fausset, 540
Wickford v. Brentford 368. 405
Wigmore's Case, 272
Wilkes v. Smallbrooke, 437
Williams v. Baron, 126. 185
East India Company, 549
Williams v. Jones 115
Williams v. Pritchard, 137
Willis v. Singer, 532
Wilson v. Poulter, 546
Wilson's Case, 41
Wilkinson v. Payne, 272. 297
Wingham v. Sellinge, 552. 558, 559
Wood v. Drury, 531
Wright ex dem. Clymer v. Littler, 444
Wright v. Powle, 135

Y

Yelverton v. Cornwallis, 544
Young v. Holmes, 540. 544

ADDENDA.

ADDENDA.

Vol. I. 506. at the end.

But it is now decided that they will connect in the following case:

The King *against* Inhabitants of Ribchester. Two justices by their order removed Robert Salthouse, his wife and two children by name, from Ribchester to Church, both in the county of Lancaster. The sessions, on appeal, quashed the order, subject to the opinion of this court upon the following case: Saturday, Nov. 13th.

The pauper Robert Salthouse, when of the age of 17 or thereabouts, was bound apprentice regularly by indenture dated the 2d of November, 1790, to Messrs. Peel and Co. Block or Calico Print Cutters, for the term of six years, the said Messrs. Peel and Co. by the said indenture, covenanting (amongst other things) to pay to the pauper, the sum of six shillings weekly during the said term. These indentures were proved to have been executed by the pauper Robert Salthouse and his mother, but no evidence was given of their having been executed by Messrs. Peel and Co. The pauper during the first two years of his said term served the said Messrs. Peel and Co. and slept in the said Township of Ribchester. After the end of that period, the pauper was sent by his said masters to work for them in the said township of Church, and he accordingly worked in the works of his said masters in Church, and slept there, except on the Saturday and Sunday nights, when he went to sleep with his

his mother in Ribchester, and returned on the Monday: the employment of his said masters being at the works in Church as aforesaid; eleven other apprentices left the works at Church on the Saturday, and returned on the Monday. The masters, Messrs. Peel and Co., knew this, and it was the usual custom for the apprentices to do so. The pauper continued to work and sleep in the manner last mentioned, for the term of two years longer, at the end of which time he entered into an agreement with Henry Walmsley, of Ribchester aforesaid, for five meals in each week, for one shilling and eight-pence a week, and he accordingly went every Saturday night to Walmsley's house, in Ribchester, and returned to the works in Church as aforesaid, and slept there, except upon the Saturday and Sunday nights as aforesaid. The pauper continued to reside and sleep in the manner lastmentioned for a quarter of a year, and until a Saturday above Shrove Tuesday 1795, when the pauper received his pay, and never returned again to the service of his said masters. On the night before this Saturday he slept in the works at Church as abovementioned. The pauper, when asked whether when he quitted the works on the said Saturday he had determined not to return again, said that he could not say that he did determine not to return, but that it seemed he did not return. When asked whether on quitting Messrs. Peel's works in Church, for the last time on the Saturday afternoon, he had formed any intention not to return, he answered that he had not—being asked the said question as to Sunday, he made the same answer; and further said that he could not fix upon any particular point of time when he determined not to return. The pauper slept at Walmsley's, in Ribchester, on the night of the Saturday in question, and for the whole of the succeeding week: he then hired himself into another employment, and returned no more

to serve the said Messrs. Peel and Co., as has been already stated.

Lord Ellenborough, C. J. In this case the master had been in the habit of receiving back his apprentices after they had gone home, and by so receiving them he shewed that it was not his purpose to renounce them on that account. On Saturday night the pauper went in pursuance of the usual indulgence, and it does not appear what his intention was at that time, either of returning or staying. He did not, however, return on the Monday; the end and conclusion therefore gives its character and denomination to the original act of departure. Finis nomen operi imponit. From what was finally done we must decide as to the determination of the apprentice, when he went away on the Saturday. We find that he did not return, and that he did not as formerly avail himself of the absence from Saturday to Monday as an indulgence. In the King *v.* Stratford-upon-Avon (1), a service was performed, the contract therefore remained undissolved. Here the apprentice by not returning on the Monday, must be considered as having broken the contract on the Saturday when he quitted his master's works; and consequently the Friday night was the last night of his residence as an apprentice: the settlement therefore was at Church, where he slept on that night and not at Ribchester.

Le Blanc, J. There is one question which has very properly not been touched upon in the argument. It is stated that no evidence was given of the indentures having been executed by the master. But it appears that they were executed by the pauper, and that is sufficient. The

(1) 11 East, 176.

question here is whether there was any residence under the indentures of apprenticeship after the Saturday, when the pauper left his master's service and never afterwards returned: without looking into the mind of the apprentice, we have one clear fact which cannot deceive us, viz. that when he left the service on the Saturday he received his wages up to that time, after which day he does not receive any more. It appears therefore that he was not in the service of his master after quitting his service on the Saturday.

Bayley J. I am of the same opinion. It is impossible to say that this apprentice was serving under the indentures of apprenticeship after the afternoon of the Saturday. The court cannot look to what was passing in the mind of the apprentice, but to his acts. From the nature of the work he was employed locally at the manufactory during the ordinary working days: but from Saturday to Monday he was free from his master. If then he was to have that time entirely to himself, at what time did he leave his master's service? It must be taken that he was not in a condition to do any act of service for his master after the Saturday afternoon.

Dampier J. The case of the King *v.* Undermilbeck (1), cited in argument, is the only case at all like the present; but in that case the master recognised the departure of the servant: for he paid him wages for the time of his absence. That therefore affords a clear distinction between the two cases. Here the apprentice was at weekly wages paid every Saturday; and the only question is, whether there was a con-

(1) 5 Term Rep. 387.

structive

structive service, which was to go on during the Saturday and Sunday. It seems to me, that the circumstance of the apprentice not having returned on the Monday, shews, that the service determined on the Saturday, when he received his last wages; although, if he had come back again, the master by receiving him again would have recognised him as his servant during the period of his being absent.

Order of Sessions quashed.(1)

Vol. I. page 507.

And the authority of Rex v. East Bridgeford has been recognized in the following case:

Rex v. Barnsley, 1 Maule and Selw. 377. On appeal against an order for the removal of Robert Gill, his wife and children from the township of Barnsley to the township of Killinghale, both in the West Riding of the county of York, the court of quarter sessions discharged the order, subject to the opinion of this court on the following case: John Gill, the father of the pauper, was bound apprentice by indenture, dated the first day of December 1764, to Thomas Harrison, in the township of Clint, for seven years, and served five years, until his master died, when in consideration of three guineas paid by William Bradfield, he was assigned by Elizabeth Harrison (widow of the said Thomas Harrison), by an unstamped indorsement on the indenture, for the remainder of his term in the words following: "April 14th 1769. Be it remembered, that I Elizabeth Harrison of Clint in the parish of Ripley, do acquit and assign over my apprentice

(1) Maule and Selw. MSS.

John Gill, for all the remainder of his said apprenticeship unto William Bradfield the younger, of Killinghale." (Signed) Elizabeth Harrison, William Bradfield; Witnesses, William Hays, George Clarkeson.

No evidence was offered to shew that Elizabeth was either the executrix or administratrix of her husband Thomas Harrison. John Gill went to and served William Bradfield, in Killinghale, till the expiration of his indenture. John Gill's family for the last seven years had been regularly relieved by having his rents paid by the township of Killinghale, during which time he and his family were residing in another parish. The pauper Robert Gill has not done any act to gain a settlement for himself.

The Attorney General and Scarlett, in the order of sessions, admitted that a stamp was not necessary at the time of the assignment, and also that if the circumstance of relief had stood by itself, the sessions would have been authorized by the case of Rex *v.* Wakefield, in drawing a conclusion different from that which they had come to; it having been decided in that case that relief afforded to the pauper's father, during his residence in another parish, was evidence of the pauper's settlement in the parish affording the relief; but still it was but evidence, and therefore may be rebutted by other circumstances. Now here it appears that the relief was given under a mistake of the settlement being in Killinghale, for the assignment of the apprentice by E. Harrison was not such an assignment as would confer a settlement. It does not appear that she had any legal interest in the apprentice; she was not proved to have been executrix, and even if she had been, it should seem from the preamble of stat. 32 G. III. c. 57., which

statute gives a power to the executor to assign, that before the act the apprenticeship ceased on the death of the master. [Bayley, J. observed that the act was confined to parish apprentices.] It must be admitted that in Rex *v.* East Bridgeford, which was before the act, such an assignment as the present was holden sufficient, and there it was argued as if the widow was to be considered as executrix de son tort; but that argument does not seem to be confirmed by the decision in Rex *v.* Chirk; and suppose the widow had been sued as an executrix, and she had pleaded ne unques executrix, could this assignment have been given in evidence to disprove such plea? [Lord Ellenborough C. J. The words, "I assign over my apprentice," purport that she had an interest. Le Blanc, J. I suppose the ground taken at the sessions was this; that at the distance of 40 years from the assignment, by which assignment the widow has assumed to act as if she had interest in the apprentice, and after the parish had maintained the pauper's family for seven years, whilst resident in another parish, the sessions ought not to have required actual proof of her being executrix.] The sessions might draw the conclusion which they have drawn, that she was not executrix. Besides there is another objection, viz. that this assignment was by indorsement on the deed, but it is not competent to assign over a deed without a deed: therefore it could not be a regular assignment without a deed. [Lord Ellenborough C. J. But it might operate as a consent of the widow to the change of service. Bayley, J. The case of St. Petrox *v.* Stoke Fleming shews, that such assignment need not be by deed.]

Lord Ellenborough, C. J. The only doubt is whether, where the sessions have drawn a conclusion palpably erroneous upon two points, we should send the case down

again, or in ease of the parties draw the irresistible conclusion ourselves. The relief given by the parish of Killinghall to the family of John Gill for seven years, is evidence of such preponderating weight that I should think any judge would direct a jury to find upon such evidence, (supposing the question legally to come before them,) that Gill was by some means or other a settled inhabitant of that parish. It does not indeed amount to an estoppel; but it is cogent evidence against the parish. The sessions also ought to have drawn a different conclusion on the other point. The assignment (which it is admitted was not at the time required to be stamped) is in its form an assignment by the widow, "as my apprentice," and at this distance of time we will presume, if necessary, that she was lawful executrix, or even if she were executrix of her own wrong, still according to the case of the King *v.* East Bridgeford, if the pauper lived 40 days under that assignment we should hold him settled in the parish; and one case is enough on such a subject.

Per Curiam, Order of Sessions quashed.

Vol. II. page 32.

Also if the value of land is increased by cultivation previous to the occupation, and by reason of an agreement to that effect, it is capable of conferring a settlement as has been decided in the following cases:

The King against the Inhabitants of Ringwood, 1 Maule & Selw. 381. By an order of two justices, Charles Trowbridge, his wife, and children, were removed from the parish of Tollard Royal, in the county of Wilts, in the parish of Ringwood, in the county of Hants.

Hants. The sessions, on appeal, confirmed the order, subject to the opinion of this court on the following case:

The pauper being legally settled in the parish of Tollard Royal, and renting a cottage there of the annual value of thirty shillings, about Easter 1806 took a dairy of seven cows, at seven pounds a cow, for twenty weeks. The cows were to be fed on lands of upwards of ten pounds annual value, part lying in the parish of Cranbourne, and part in the parish of Ringwood. The pauper also had a small house with the dairy, situate in the parish of Ringwood, in which the pauper's wife and family resided during the whole twenty weeks; and the pauper slept sometimes at Tollard Royal and sometimes at Ringwood. For about 12 weeks of the time he slept at Ringwood, and about eight weeks in his cottage at Tollard Royal, of which he kept possession during the whole time. About nine o'clock of the night before the pauper gave up the dairy, having slept the preceding night at Tollard Royal, he came to Ringwood to pack up his furniture, and fetch back his wife and family; and he passed the night there, but did not sleep nor go to bed, but was occupied in packing up his goods. A waggon came about two o'clock in the morning to take the goods, and the pauper, his wife, and family, with the waggon and goods, left their house at Ringwood between five and six o'clock in the morning, and returned to their cottage at Tollard Royal. The pauper afterwards quitted this cottage, and in the same year rented another cottage in the same parish of Tollard Royal, for which he paid two guineas a-year, and he had the use of a yard for his beasts, fowls, and pigs to run in, for which he paid one pound a-year, and his landlord had the use of the yard at the same time, whilst he occupied this cottage and yard, he took nearly an acre of land in

another parish, at the rent of eight pounds from Easter to October following, for planting potatoes. The ground had been dug by the landlord for that purpose, and it would not have been let for more than half that price, if it had not been dug. The pauper got a good profit by his crop: he also took twenty-eight lug of land of another person, which was ploughed for the same purpose; for which he paid fourteen shillings, and during the time he rented these pieces of land, he lived with his family in his house at Tollard Royal. Other land is let in the same parish at the same rate, when ploughed and prepared ready for potatoes in like manner. In a common way, an acre of such land would not let for more than two pounds, though when dug for a crop of potatoes it would let for eight pounds.

Grose, J. — The only question is, whether the pauper came to settle on a tenement of the yearly value of ten pounds. Looking at the case, we find that he went to Tollard Royal with his family, and resided there more than forty days. As to the value of the tenement which he occupied during that time, it is expressly stated to be above ten pounds; but it has been contended that the land which he rented from Easter to October for planting potatoes, might be worth eight pounds for that time, and yet not of that value for a year. That proposition I do not understand, and therefore cannot assent to it.

Le Blanc, J. — In this case the pauper rented a cottage in Tollard Royal, at two guineas a-year, during which time he also rented nearly an acre of land in another parish, from Easter till October, for planting potatoes, at the rent of eight pounds; which land had been

been previously dug by the landlord, and would not have been let for more than half that price, if it had not been so dug. The pauper also took another piece of land at fourteen shillings. All these premises taken together at the rent for which they were let, amount to above the value of ten pounds. But the question is, whether we are to reduce that value by taking the land which was let for eight pounds, at the rent for which it would have been worth to be let if it had been in a different state? or in other words, whether we are to deduct from the rent the value of the labour bestowed by the landlord on the premises before he let them? I think the court must look to what was the value of the tenement at the time the pauper came to settle upon it, without considering by what means it became of that value. I agree with the gentlemen who have argued on the other side, that the value of the tenement increased by the labour bestowed upon it after the letting cannot be taken into account; as if the pauper had taken it at the rent of five pounds, and had bestowed labour upon it to the amount of five pounds more, that would not have made a renting of ten pounds. But where the labour has been previously bestowed, so as to make the land fairly worth the rent at the time it is taken, the court cannot separate the value of that labour from that of the land.

Bayley, J. — This is nothing more than a party taking land in a high state of cultivation, which has rendered it of the value agreed to be given for it at the time of the taking. Nor do I think that it would have been worth less if it had been taken for a whole year. It is urged, indeed, by the counsel, that if the pauper had taken it for a year, he would have had to dig it himself, and then it would have been of less value to him than what was given for it for a shorter period; but it does

does not follow, that if he had taken it for a year, he would necessarily have had to dig it. I think, therefore, that this tenement, coupled with the other property, amounts to a tenement of more than 10l. a-year.

Order of Sessions quashed. (1)

The King *against* the Churchwardens and Overseers of the poor of the parish of West Cramore.

On appeal against an order of two justices for the removal of William Norris, Ezel his wife, and their four children, from the parish of Monckton Deverell, in the county of Wilts, to the parish of West Cramore, in the county of Somerset, the court of quarter sessions confirmed the order, subject to the opinion of this court on the following case:

A settlement in the parish of West Cramore was proved by the respondents, subsequently to which the pauper rented a house at Monckton Deverell, of the value of 3l. *per ann.* and occupied it and resided thereon for four years. During one year of his said tenancy, he rented of one Mary Rossiter 136 lugs of land, at Monckton Deverell, at the rate of 9d. per lug, amounting to the sum of 5l. 2s. for the purpose of planting potatoes. He also, at the same time, rented of one Benjamin Maish, 58 lugs, at Hill Deverell, an adjoining parish, at the same rate of 9d. per lug, amounting to 2l. 4s. 9d., the rentings together amounted to 10l. 6s. 9d. The pauper agreed to take the land of Mary Rossiter, ready ploughed and manured; when he took it the ploughing and manuring was begun, but not finished, but when he entered upon it, it was quite prepared. At the time of planting, he followed Mrs. Rossiter to plough, and planted the potatoes himself, which were

(1) See Rex *v* Purley, 16 East, 126.

afterwards

afterwards covered in by the plough. The agreement with Maish was similar to that with Rossiter; when the pauper took and entered Maish's land, it was ready ploughed and manured. The potatoes were planted in the same manner as before stated. The two pieces of land, together, without being ploughed and manured, were worth about 2l. 8s. *per ann.*, but being ploughed and manured, were worth what the pauper paid for them, namely, 7l. 6s. 9d. The pauper took the two pieces of land in the spring, for hoe crop, and he planted the potatoes in May, and took the crop out in November.

Gaselee and A. Moore, in support of the order of sessions, said, that this case had been reserved at the sessions before the case of Rex *v.* Ringwood, which, however, could not be relied on as decisive of the present case, because there the land had been dug by the landlord before the letting; whereas, here it is found that the ploughing and manuring was not completed when the pauper took the land. And Le Blanc, J. in Rex *v.* Ringwood, says, "that the value of the tenement, increased by the labour bestowed upon it after the letting, cannot be taken into the account."—This agreement was, in effect, to take the land, and to employ the landlord as his labourer to improve its value. It is quite clear, that if the pauper had employed labourers himself, and thereby raised the value, a settlement would not have been gained; and this is in substance the same thing.

Lord Ellenborough, C. J. The pauper agreed to take a tenement, which should be of a certain value; and at the time when he entered on it, it was of that value; for the ploughing and manuring were then finished.

Le Blanc

Le Blanc, J. The distinction relied on does not vary the case; because no precise sum was agreed to be paid for the labour. The observation alluded to must be taken with reference to the case then before the court, and not as applicable to a case of this kind.

Both orders quashed. (1)

Vol. II. page 92.

And the authority of Rex *v.* Mattingley has been recently recognized and adopted in the following case:

The King *against* the Inhabitants of Olney. The court of quarter sessions for the county of Buckingham, discharged an order of two justices, for the removal of Richard Mayes from the parish of Olney, in the said county, to the parish of Earls Barton, in the county of Northampton, subject to the opinion of this court on the following case:

The respondents proved the pauper settled at Earls Barton, by a certificate, dated the 25th of July, 1788, and directed to the parish of Olney, acknowledging him to be a legally settled inhabitant of the parish of Earls Barton. In order to shew a subsequent settlement, the appellants proved, that whilst the pauper was residing in the parish of Olney, under the said certificate, in or about the month of September 1800, and some time prior to the execution of the deed of feoffment hereinafter mentioned, he agreed with one Michael Hinde, that he the pauper would purchase a messuage belonging to Hinde, situate in Olney, at the sum of 52l., if Hinde would allow 40l., part of the said 52l. to remain upon mortgage, to which Hinde consented; and, in pursuance thereof, by deed of feoffment, bearing date the 8th of October, 1800, Hinde, in consideration of the

(1) Maule and Selw. MSS.

sum

sum of 52l. therein mentioned to be paid by the pauper, conveyed to him (the pauper) in fee the said meſſuage; and upon the deed of feoffment there was indorsed a receipt for the consideration-money of 52l., but in fact only 12l. were paid to Hinde, and the remaining sum of 40l. was secured to him by deed of mortgage bearing date the 9th of October, 1800, by which the pauper, pursuant to the agreement before mentioned, demised the said messuage to Hinde for a term of 1000 years, in consideration of the sum of 40l. in deed of mortgage mentioned to have been paid by Hinde to the pauper; and there was a proviso for the deed's becoming void upon payment by the pauper, his heirs, executors, or administrators, to Hinde, his executors, administrators, or assigns, of the sum of 40l., with lawful interest, upon the 9th of April then next ensuing. The feoffment and deed of mortgage were both executed at the same time, and remained, together with the title-deeds, in the custody of Hinde. The pauper immediately entered into poſſeſſion of the messuage, and continued to reside therein, and paid the interest upon the said sum of 40l. to Hinde, until the execution of the deeds hereinafter mentioned; but, during such time, never had any ability to pay off the principal. About a month before the 12th of June 1812, the pauper agreed with one Thomas Bowden to sell to him the said messuage, in consideration of the sum of 60l., and soon afterwards Bowden paid to Hinde the sum of 40l. in discharge of his mortgage, and in part of his (Bowden's) purchase-money, and received from Hinde the title-deeds, together with the deeds of feoffment and mortgage, which Hinde had never delivered up to the pauper. Afterwards, by indorsement on the said indenture of mortgage, bearing date the 12th of June 1812, Hinde, in consideration of 40l. to him therein mentioned to be paid by the pauper, assigned the term of 1000 years

to

to the pauper, and by deed of lease, dated respectively the 12th and 13th of June 1812, the pauper conveyed the messuage to Bowden in fee, for the consideration of 60l.; and 20l., being the balance of the purchase-money, were then paid by Bowden to the pauper. The indorsement and indentures of lease and release were all executed at the same time. The question for the opinion of the court is, whether the pauper gained a settlement in the parish of Olney, by the purchase of the above estate and residence thereon.

Grose J. The question is, whether this was a purchase for the sum of 30l. *bonâ fide* paid, so as to satisfy the statute 9 Geo. I., where the purchase was contracted for the security to be given for part of the purchase-money, and such part never paid by the purchaser. The case in substance states, that the premises were mortgaged for 40l. of the purchase-money, and that that money was not paid. But I think that the consideration must be *bonâ fide* paid at the time of the purchase, in order to satisfy the statute. Then it is clear that this was not a purchase of an estate for 30l. paid at the time, the consideration-money having remained upon security.

Le Blanc J. The stat. 9 Geo. I. enacts, that no person shall gain a settlement by virtue of any purchase of any estate, whereof the consideration doth not amount to 30l. *bonâ fide* paid. The question arises on the purchase. The purchase-money amounted to 52l., of which 12l. only were paid at the time, the rest was left on mortgage to the vendor. The circumstance distinguishes it from the cases cited, where the party purchasing paid the whole money to the vendor by borrowing a part *aliunde;* so that there he had credit to borrow of others. But in Rex *v.* Mattingley, which has

not been cited, it was held where the purchaser contracted for the purchase of a copyhold estate for 39l., which was mortgaged for 32l. and paid only 7l., and was admitted subject to the mortgage, that it was not a purchase for 30l. *bonâ fide* paid so as to take it out of the statute. That is a direct authority on this part of the case. But it has been argued upon a supposed difference, inasmuch as the purchase-money was ultimately paid in the subsequent transaction with Bowden. But how does it stand? All that was done by Bowden, when he became the purchaser of the estate, was to pay off the incumbrance in order to get the title-deeds into his hands, which had never passed from the original seller into the hands of the pauper; that was a payment therefore made by Bowden for his own benefit, and not on behalf of the pauper. Bayley, J. concurred.

Order of Sessions quashed. (1)

Vol. II. page 121.

And for another case in which the court held that a settlement should have been presumed from relief given in a foreign parish. — Rex *v.* Barnsley, Addenda, Vol. I. p. xxxv.

(1) 1 Maule and Selw. 387.

A TREATISE

A

TREATISE

ON THE

LAWS OF THE POOR,

&c. &c. &c.

CHAPTER I.

Of the Manner of providing for the Poor previous to the Statute 43*d* Elizabeth, *cap.* 2.

THE duty of maintaining the poor is said to have devolved upon the clergy for some ages after the introduction of christianity into England. Originally a fourth, and afterwards a third of their tithes was devoted to this charitable purpose, and administered by the incumbent under the superintendance of his bishop (1). The churchwardens and principal inhabitants are supposed to have taken some share in making a judicious application of this parochial fund (2), But if such interference ever did take place, it was by the rector's

(1) Kennet. Impropr. 14, 15. 1 Black. Com. 359. Burn's Hist. of the Poor Laws, 1, &c.

(2) 3 Burn. tit. Poor.

permission,

permission, for they had no power to direct the expenditure, or control the misuse. (1)

The period is not ascertained at which this portion of tithes was applied to other purposes. We may conjecture that it was gradually re-assumed, through the increase of monastic institutions. The principal or rectorial tithes of many parishes, being appropriated to the use of religious orders, they undertook a share of the burthen, as they retained the funds originally set apart for the poor's support.

The legislature does not appear to have interfered with this application of ecclesiastical revenues, except in a solitary instance. In the 15 of Richard the second an act passed, requiring, "that in every licence to be made "in the chancery of the appropriation of any parish "church, it shall be expressed that the diocesan shall "ordain, according to the value of such church, a con-"venient sum of money to be paid and distributed yearly "of the fruits and profits thereof, to the poor pa-"rishioners, in aid of their living and sustenance for "ever." (2)

Until the first attack made upon monastic property at the dawn of the reformation, the revenues of the clergy were administered in other respects according to the rules framed for particular endowments, or the general regula-

(1) "In ancient times, tithes were "divided into three parts,—the first "for maintenance of religion, the "second for the church, and the "third for the poor; but the third "division was a matter of *charity* "rather than of right. When by the "second Lateran council, in the "twelfth century, (A. D. 1139,) "tithes were appropriated to particular parishes, they were not con-"sidered as making in any part a pro-"vision for the poor, which might be "claimed as a right." Per Lord Loughborough, C. J. Steel v. Houghton et ux. 1 H. Black. 52.

(2) Chap. 6. enforced by 4 H. IV. chap. 12. 5 Hen. IV. Rot. Parl. 74. 1 Gwill. 14.

tions

tions ordained for the government of the church and the discipline of its members. Several statutes were passed to regulate the internal œconomy of religious houses; but the object of these laws was to ease the regular clergy from an oppressive and tributary hospitality exacted by the powerful, which absorbed their revenues and usurped the portion of charity and the dues of the indigent. (1)

The alms supplied by monasteries, together with hospitals and other institutions founded and endowed for the purpose of charity, constituted the chief but not the sole resources of those who fell back upon their fellow-creatures as unable to sustain themselves (2). The effects of persons dying intestate were vested in the ordinary, to be applied, among other pious uses, to relieve the poor of his diocese; and private charity derived vigour and energy beyond the common impulse of humanity, from the superstitious notion that prayers purchased by donations to the poor, conferred everlasting happiness upon the dead.

The aged and impotent poor had no other sources of support, until the reign of Henry VIII.; for since the conquest, neither the common nor statute law made any direct provision for the purpose, unless permitting the poor to beg by licence can be deemed an exception.

The author of the Mirror states indeed (3), that by the common law, "the poor were to be sustained by parsons, "rectors of the church, and the parishioners, so that none "of them shall die for default of sustenance." But no method is pointed out by which the performance of this

(1) Stat. 3 Ed. I. ch. 1. 35 Ed. I. stat. 1. c. 1. 9 Ed. II. stat. 1. c. 11. 1 Ed. III. stat. 2. c. 10. 14 Ed. III. stat. 4. c. 1.

(2) 1 Black. Com. 359.

(3) Mirr. c. 1. s. 3.

duty could be enforced, or its omission punished (1). Such abstinence from regulation on the part of our civil government, is no slight testimony that the clergy devoted a sufficient portion of their immense property to maintain the poor (2). If any objection can be made to their conduct, it is, that their charities were lavished with inconsiderate humanity, detrimental to the industry and police of the country.

The various and highly penal laws made during this period against vagrants and sturdy beggars (3), a description of persons nourished in their way of life by the largesses of misguided piety, gives some countenance to this opinion.

But a more direct proof of the fidelity with which the clergy administered the trust reposed in them, arises from observing, that the first legislative attempt to provide for the impotent poor, was made in the same year when the property of so many religious houses was vested in the crown. The first great act of dissolution 27 Henry VIII. c. 28. affords a decisive testimony, not only of their hospitality, but of their efforts to promote agriculture and industry. It enacts, that all persons to whom the king shall demise the sites, and demesnes of any of the dissolved

(1) 1 Black. Com. 359. Mr. Justice Gould was of opinion that, "ever "since the settlement of parishes, the "poor inhabitants were esteemed as "parishioners, and *their necessities to be* "*relieved* by the parish to which they "belonged." Steel *v.* Houghton et ux. 1 H. Black. 55. But the opinion of Lord Loughborough, C. J. Ib. 52. seems contra, post. 6.

(2) A third, and some say a greater proportion of the entire property of the kingdom was vested in the clergy at the time of the conquest, and in the reign of Richard II. they held a fourth. At the commencement of the reformation, the regular or monastic clergy are calculated to have possessed what amounted to a fifth of the revenues of the kingdom, See 2 Burn's Ecc. Law. tit. Monasteries, and the authorities there cited.

(3) See them collected, Burn's Hist. of the Poor Laws, chap. 3. p. 22.

houses,

houses, shall keep an honest continual house and household there; and for that purpose occupy yearly as much of the demesnes in ploughing and tillage of husbandry, as the said religious had done before, on pain of 6l. 13s. 4d. a month, and the justices in sessions were to inquire thereof. This regulation continued until 21 Jac. I. when the clause was repealed.

The 27 Hen. VIII. c. 25. contains the first provision by which particular districts are directed to support their poor, so that none of them of very necessity shall be compelled to go openly in begging. The act was enforced by a trivial penalty of 20s. per month. Many schemes were proposed and enforced by subsequent statutes to accomplish this object. They are collected in the fourth chapter of Dr. Burn's history of the poor laws (1), and it is sufficient for the present purpose to point out their general tendency in the words of that respectable author.

"It is curious" (says he) (2) "to observe the pro-
"gress, by what natural steps and advances the compul-
"sory maintenance became established. First, the poor
"were restrained from begging at large, and were con-
"fined to beg within certain districts. Next, the several
"hundreds, towns corporate, parishes, hamlets, or other
"like divisions, were required to sustain them with such
"charitable and voluntary alms, as that none of them of
"necessity might be compelled to go openly in begging.
"And the churchwardens, or other substantial inhabi-
"tants, were to make collections for them, with boxes
"on Sundays, and otherwise by their discretions. And
"the minister was to take all opportunities to exhort and
"stir up the people to be liberal and bountiful. Next,

(1) 12 R. II. c. 7. 11 H. VII. c. 2. c. 2. 2 & 3 Ph. & M. c. 5. 5 Eliz. c. 3. 19 H. VII. c. 12. 22 H. VIII. c. 12. 14 Eliz. c. 5. 27 H. VIII. c. 25. 1 Ed. VI. c. 3. 3 & 4 Ed. VI. c. 16. 5 & 6 Ed. VI.

(2) Ch. 5. p. 105.

" houses were to be provided for them by the devotion " of good people, and materials to set them on such work " as they were able to perform. Then, the minister, " after the gospel every Sunday, was specially to exhort " the parishioners to a liberal contribution. Next, the " collectors for the poor, on a certain Sunday in every " year, immediately after divine service, were to take " down in writing, what every person was willing to " give for the ensuing year; and if any should be obstinate " and refuse to give, the minister was gently to exhort " him; if still he refused, the minister was to certify such " refusal to the bishop of the diocese, and the bishop " was to send for and exhort him in like manner; if he " stood out against the bishop's exhortation; then the " bishop was to certify the same to the justices in sessions " and bind him over to appear there: And the justices, " at the said sessions, were again gently to move and per- " suade him; and, finally, if he would not be persuaded, " then they were to assess him what they thought reason- " able towards the relief of the poor. And this brought " on the general assessment in the fourteenth year of " Queen Elizabeth."

43 Eliz. c. 2.

This statute underwent some modifications during the government of that excellent princess (1). But in the 43d year of her reign (2), another act was framed upon those which had passed previously, and which is said to have first introduced a right to a maintenance by settlement (3). Under this statute, with a few alterations to be noticed hereafter, the fund for setting the poor to work, and maintaining those who are unable to do so, is raised at this day.

(1) 18 Eliz. c. 3. 35 Eliz. c 4. 39 Eliz. c. 3. c. 4. c. 5. c. 21.

(2) C. 2.

(3) Per Lord Loughborough, C. J. Steel *v.* Houghton et uxor. 1 H. Black. 53.

CHAP-

CHAPTER II.

Of the Local Divisions by which the Poor are to be maintained.

THE more ancient statutes for regulating the poor were enacted to repress their vagrancy, not to provide for their maintenance. They refer to the civil division of the kingdom into townships and hundreds, and not to that of parishes which respects our ecclesiastical institutions. (1)

Origin of maintaining the Poor by parishes.

The first direct mode adopted for raising a fund to relieve the indigent, after the suppression of monasteries, was by collecting alms in the church. The former liberality of the clergy, their influence over the moral feelings of their parishioners, and the necessary connection between their functions and the duties of charity, induced the legislature to adopt a practice, which seems to have had its original foundation in the primitive institutions of our church.

When money was thus collected by parishes, it followed of course that it should be distributed within the same limits. The 43d of Eliz. c. 2. made no alteration in this particular, but devised a more effectual method for raising that fund, by which the poor were supported in parishes when the statute passed.

It enacted, that "the churchwardens of every parish, "and four, three, or two substantial householders there, "as shall be thought meet, having respect to the propor- 42d Eliz. c. 2. s. 1.

(1) 12 R. II. c. 7. 11 H. VII. c. 2. c. 19. H. VII. c. 12. 22 H. VIII. c. 12.

" tion and greatness of the same parish and parishes, to " be nominated yearly in Easter week, or within one " month after Easter, under the hand and seal of two or " more justices of the peace in the same county, whereof " one to be of the quorum, dwelling in or near the same " parish or division where the same parish doth lie, shall " be overseers of the poor of the same."

Sect. 9. provided, that where any parish extends into more counties than one, or into different liberties, the magistrates of which possess an exclusive jurisdiction, that each set of magistrates shall nominate overseers within their respective jurisdictions, who are to execute the office through the entire parish.

Confined to parishes.

By this act therefore, the appointment of overseers, and every provision for the management of the poor, was confined to parishes.

Or reputed parishes.

It was decided indeed, that a village having a church of its own, and being held and reputed a parish prior to the 43d Eliz. c. 2., and having all parochial rites and distinct churchwardens, is entitled to the separate government and maintenance of its poor within the meaning of the act, although it in fact constitutes part and parcel of a rectory (1) or parish (2), to the parson of which the tithes are payable. For the statute entrusts the administration of the poor to the churchwardens and overseers; but the churchwardens of the parish are not in these instances churchwardens of the village; the act, therefore, must be supposed to refer to such places as were reputed parishes at the time it was enacted, the churchwardens of which were to meddle with the church *there*, and by consequence with the poor.

(1) Hilton *v.* Pawle, Cro. Car. 92. W. Jones, 356. Hutt. 93. s. c.

(2) Nicholas *v.* Walker, Cro. Car. 394. 2 Roll. Abr. 66.

But

But the words of the statute could not be pushed to a more extended construction. A vill not being a parish by reputation prior to 43d Elizabeth, and having no distinct churchwardens, but performing its parochial rites, such as marriages, burials, &c. subsequent to that act in the parish church, was adjudged to be within the parish, although it had made poor rates since the statute, and had possessed a chapel previous to the act being passed. For making rates will not make it a parish without all other parochial rites. (1)

Dont extend to vills, not parishes by reputation.

Two inconveniences followed from the provisions of the statute, being confined to parishes:—

1. Many considerable districts in the kingdom, more especially forest and abbey lands, were not situated within any parish; and consequently their poor could reap no benefit from the act. No settlement could be gained there, no rate made, and persons who became chargeable to other parishes without having acquired a settlement, could not be removed back to be there supported. (2)

Inconveniencies of 43d Eliz. c. 2.

2. Several parishes, particularly in the northern parts of the kingdom, were of such great extent as to render it difficult to fulfil the purposes of the act within such extensive limits. Overseers being appointed for the whole parish, could neither inspect the wants nor the conduct of a numerous poor, spread over a district, many miles in circumference. The same circumstance threw considerable difficulty in the way of making and collecting an equal rate.

To remedy this, it was provided by 13 and 14 Car. II. c. 12. s. 21., which, after reciting, that "whereas the inhabitants of Lancashire, Cheshire, Yorkshire, North-

Remedied by 13 & 14 Car. 2. c. 12.

(1) Rudd *v.* Foster, 4 Mod. 157. 2 Salk. 601.

(2) Dolting *v.* Stokelane, Fort. 219. Bridewell *v.* Clerkenwell, 2 Salk. 486. Dean *v.* Linton, 1b. 487.

"umber-

" umberland, the bishoprick of Durham, Cumberland, " and Westmoreland, *and many other counties in England* " *and Wales*, by reason of the largeness of the parishes, " cannot reap the benefit of the said act of the 43d Eliz." enacts, " that all and every the poor, needy, impotent, " and lame persons, within every township or village " within the several counties aforesaid, shall be main- " tained, provided for, and set on work within the se- " veral and respective townships and villages wherein he " shall inhabit, or wherein he was last lawfully settled; " and there shall be yearly chosen and appointed two or " more overseers, within every of the said townships or " villages respectively."

Extends to all counties.

This act, from the superadded words, " many other " counties in *England* and *Wales*," was held to extend throughout the kingdom, notwithstanding the particular enumeration in the preamble, and a reference to them in the enacting clause, the counties specified being considered as put by way of instances. (1)

2d, To extraparochial places.

It was also held by a liberal and remedial construction of the words " every township and village," that not only parishes of an inconvenient magnitude might be subdivided under the statute, but that overseers might be appointed for such towns and vills as were extraparochial (2).

But only to vills or townships.

Under the words of the act, however, overseers can only be appointed for a place which is either actually or by reputation a vill or township (3), or an hamlet, which

(1) Dolting *v.* Stokelane, Fort. 219. Rex *v.* Justices of Middlesex, 1 Bot, 34. Pl. 56. Clifton *v.* Churcham, And. 314. But the contrary had been decided so early as 27 Car. II. in Skillington *v.* Norton, 2 Lev. 142.

(2) Dolting *v.* Stokelane, Fort. 219. Rex *v.* Rufford, 1 Str. 512.

(3) Rex *v.* Justices of Bedfordshire, Cald. 167. Rex *v.* Showler & Atter, 3 Burr. 1391. Rea *v.* Rufford, 2 Str. 1143. and several other cases. But Liddle-

which in common acceptation is considered as synonimous (1). An appointment therefore of overseers "for "the precinct of the Tower, *otherwise called* the parish "of St. Peter's, *ad vincula* within His Majesty's tower "of London," was quashed as bad. For it is not good as an appointment for a parish, under the words "other- "wise called the parish of St. Peter ad Vincula," inasmuch as the name or description which precedes an "*otherwise called*," is to be considered as the true one, and not the name and description which follows it (2). Neither is it good as as an appointment under 13 & 14 Car. 2. c. 12. For precinct is a word of ambiguous signification; it is not a boundary of any parish or vill; it may be more than a parish or may be less; and the court ought not to intend that it is a township or vill, in order to make an appointment good that is not warranted by the statute (3). So an order of removal to "a certain extraparochial place called Brewcomb's "Lodge," is bad, for the court cannot intend it to be a vill. (4)

What is a township?

Some questions have arisen as to what is a township or vill within the meaning of the act. Lord Hardwicke observes, that it is difficult to define exactly what is a township or village, and that it must be left to the judgment of the court upon the case stated (5). According to

Liddleston *v.* Mayor of Exeter, Foley 19. seems contra.

(1) Rex *v.* Morris, 4 Term Rep. 550. And see the opinion of Probyn J. Rex *v.* Welbeck, 1 Bott, 34. Pl. 55.

(2) It is held in conformity to this rule, that the addition of a person indicted must precede the otherwise called. John Fassel's case, Cro. Eliz. 583. 3 Bulst. 296. Semple's case, Leach, Cro. Cas. 326.

(3) Rex *v.* Severn & Arnold, Say. 278, 4 Burn J. Overseer, sect. 1. But see Liddleston *v.* Mayor of Exeter, ut supra.

(4) Dolting *v.* Stokelane, ut supra. But it is observed there by Parker, C. J. that "if it were said at Brewcomb Lodge, generally and no more, that might be intended a vill;" and if a place be named generally, it shall be taken to be and intended a vill. So the law intends every parish to be a vill until the contrary is shewn. Cooke *v.* Hundredors of Pimhill, 8 East, 113. Adjudged, Vinkeston *v.* Ebden, 2 Salk. 501.

(5) Rex *v.* Denham, Burr. S. C. 37.

Lord

Lord Coke, there cannot be a town in law unless it hath, or in time past hath had, a church and celebration of divine service, sacraments, and burials (1). These circumstances may form a decisive criterion when the chapel is in its nature parochial (2). But as the words "township and village" are used in the statute to denote subdivisions of a parish which has usually no more than a single church, and also extraparochial places in forests and elsewhere, which are often without one, a church and celebration of service can hardly be considered as indispensable to distinguish the constitution of these local divisions, so far as respects the settlement and relief of the poor. Mr. J. Buller states one criterion to be, "that where there is a constable there is a township; for they may be a constable for a larger district, but not for a smaller, and that the doubt in many of the cases has arisen where there was no constable (3)." Mr. J. Lee expressed a similar opinion in a former case (4). The rule is the same in places where they have tythingmen and no constable (5). Earlier cases state, that in order to render an extraparochial

If there is a constable.

The number of houses.

(1) Lord Coke defines it thus: Villa est ex pluribus mansionibus vicinata et collata ex pluribus vicinis. 1 Inst. 115. b. and the authorities there cited. Spelman states its more modern signification to be plurium mansionum connexio.

(2) See Rudd *v.* Morton, 2 Salk. 501. This remark is not meant to extend to extraparochial places anciently appropriated for ecclesiastical and similar institutions which originally formed no part of the civil divisions of the country, and to which the laws that provide for the poor seem not to be designed originally to extend. Such are the sites and areas of cathedrals, colleges and inns of court. See Rex *v.* Justices of Peterborough, Cald. 238.

(3) Rex *v.* Sir Watts Horton, 1 Term Rep. 374.

(4) Rex *v.* Denham. Burr. S. C. 35.

(5) Waldron's case, 1 Mod. 78. But there must be a distinct constable for the vill or tithing. For Lord Hale observes, "the parish of A. may contain the vills of A. B. & C., that is, where there are distinct constables in every one of them. But if the constable of A. doth run through the whole, then is the whole but one vill in law. Or where there is a tithingman, it may be a vill; but if the constable run through the tithing then it is all one vill." Ibid. see also Green *v.* Proud, 1 Mod. 117.

place

place subject to the poor laws, it must consist of more than two houses. (1)

For the definition of a vill or township, is a place consisting of many mansions and many neighbours (2), or according to Lee J. it corresponds to the legal notion of a tithing (3). The reasoning of the judges in these cases seem to regard the state of the place at the time when overseers are to be appointed, as the material circumstance, instead of its ancient condition, for they assign as a reason why there must be more than two householders to bring the place within the act, that otherwise the same persons would be overseers for life. (4)

But the court in more recent determinations consider the ancient condition of the place as that to which the act meant to refer; and therefore overseers may be appointed for a vill by reputation, although there exist but two houses when the appointment is made (5). Yet whether more houses than two are not necessary to constitute a vill, where no other facts exist to prove it a vill by reputation, seems undecided. (6)

Townships, &c. how proved.

Towns and vills, being ancient divisions of the country, may be proved by different sorts of evidence, like any

(1) See the opinion of Parker, C. J. Dolting *v.* Stokelane, ut supra. Of Ld. Hardwick, C. J. Rex *v.* Denham, ut supra. Per Lee, C. J. Rex. *v.* Welbeck, 1 Bott, 33. Pl. 55. But Lord Mansfield expressed some doubts of this. Rex *v.* Eyford, Cald. 542.

(2) Ante, 12. n. (1).

(3) Rex *v.* Denham, ante, 11. n. (5).

(4) Dolting *v.* Stokelane, Fol. 98. 1 Bott, 32. notes. Rex v. Denham, ante, n. (3) Where Page, J. delivers it as his opinion, "that a single house or two "houses cannot amount to the notion "of a township or village. If it had "been formerly a town, and the houses "were in fact decayed and gone, it "would cease to be a town or village." But see Lord Coke's opinion, contra, post. n. (5).

(5) Rex v. Eyeford, Cald. 542. Rex v. Ronton Abbey, 2 Term Rep. 207. Rex *v.* Stubbs, 2 Term Rep. 406. This conforms to Lord Coke's opinion, that "if a town is decayed so as no houses remain, yet it is a town in law. 1 Inst. 115. b.

(6) Ibid.

other facts. The true point being, whether the place in question has been treated, as a vill or township, or at least reputed to be so? If a place has a constable, it is decisive evidence that it was so considered from time immemorial. But it is not the sole proof, because the appointment of a constable is not essentially incident to the existence of a township. The number of houses, or rather of families, may have been the original reason for giving this denomination to a particular place. But although this fact may be used as a ground from whence the existence of a township may be inferred, it is not equally decisive with the appointment of a constable, for the number of houses may have increased or diminished from accidental circumstances long after the division had taken place. It is sufficient therefore if it be shewn to have been a vill by reputation, as where it has formerly had overseers, who received paupers and granted certificates and the like (1). When that is shewn, an extraparochial place may be deemed a vill, though consisting of only two (2) or three houses (3), as where it is not so it has been adjudged not to be a vill, although it comprehended many mansions (4).

Determinations.

Thus an extraparochial manor, once consisting of a capital mansion and three keepers' lodges in the park, the park being since converted into farms, of which there are five; each having a dwelling-house occupied by a different tenant, was held not to be a vill, never having been reputed as such, or having had an overseer (5). In adherence to the same rules, an hamlet, consisting of one

(1) Rex *v.* Eyeford, Cald. 542. But a voluntary relieving of the poor does not seem sufficient. See Rex *v.* Peterborough, Cald. 238.

(2) Rex *v.* Eyeford, supra. n. 1.

(3) Rex *v.* Ronton Abbey, supra.

(4) Rex *v.* Justices of Peterborough, Cald. 238.

(5) Rex *v.* Grafton, Bur. Set. Ca. 101. This case was decided without argument, and is so referred to by Lee C. J. Rex *v.* Welbeck, 1 Bott, 33. Pl. 55. But it is cited as law by Aston J. Rex *v.* Tamworth, Cald. 28.

house and three or four hundred acres of land, being part of a parish, and paying to the church rates thereof (1); an extraparochial place, consisting of two houses and three hundred acres of land, belonging to and in the occupation of several persons (2); one consisting of a farm, and capital messuage, inhabited by the tenant of the whole, a tenement part thereof inhabited by a poor widow and her five children, with three cottages (two ancient and one lately built), which are under-let by him to his labourers (3); a capital mansion house and large farm house thereto belonging, of the value of 200l. per year, with three other farm houses and farms belonging to each, worth together 500l. a year, and containing within it four substantial householders, but being extraparochial, and never reputed a vill, nor having a constable belonging to it (4). The extraparochial sites and areas of ancient cathedrals and colleges—inns of court, though consisting of many tenements (5), never having appointed overseers, nor been reputed townships, but having a private chapel not under the bishop's jurisdiction, and without chapelwardens, do not come within the operation of the poor law.

Townships, &c. how erected into

The court of quarter sessions has no power to divide a parish into townships, by an original order (6), or to erect

(1) Rex *v.* Tamworth. Cald. 28.

(2) Rex *v.* Denham. Burr. Set. Ca. 35.

(3) Rex *v.* Showler & al. 3 Burr. 1391.

(4) Rex *v.* Justices of Bedfordshire. Cald. 167.

(5) Rex *v.* Justices of Peterborough, Cald, 238. It was stated in the case that Peterborough Minster was an extraparochial place, containing upwards of sixty acres of ground, upon which were twenty-five dwelling houses at least, besides poor houses, of the annual value of 40l.; that these houses were inhabited, except in the instance of the bishop and three of the prebendal houses, by laymen or strangers to the cathedral, mostly persons of fortune, who kept servants that acquired settlements therein. The poor had been supported by the dean and chapter, and not by the inhabitants, and there was neither constable, overseer, churchwarden, or other civil officer appointed for the precinct.

(6) Rex *v.* Flag, Fol. 8. 1 Const. Peart *v.* Westgarth, post. 16. n. (4). Rex *v.* Uttoxeter, Cald. 86.

a vill

independent districts.

a vill into an independent district, which shall maintain its own poor. It is done by two magistrates, appointing overseers, in the same manner as those officers are appointed for districts which have sustained their poor since the statute passed.

When extraparochial places.

Where a vill or township is extraparochial, this is a matter of course (1). It seems to have been decided that the appointment must expressly call it a township or vill, or the court will not intend it so. (2)

But magistrates do not usually interfere in the first instance to divide a parish into townships, where it has previously maintained its poor in the aggregate. It is more prudent to take the opinion of the court of king's bench in another shape, as to the expediency of doing so before they bring a measure into effect, which may be attended with some responsibility.

To divide a parish.

To divide a parish into districts two things are necessary, 1st, It should consist of two or more distinct vills or townships, such as have been described (3). 2d, It must appear that the parish cannot otherwise conveniently enjoy the benefit of the 43d Eliz. c. 2. (4)

For where a parish had two overseers appointed for the whole parish, and but one rate; each overseer collected

(1) Rex *v.* Ronton Abbey, 2 Term Rep. 207.

(2) Rex *v.* Severn and Arnold, Say. 278. But see Dolting *v.* Stokelane, Fort. 213. Fol. 98. Vinkeston *v* Ebden, 2 Salk. 501, ante, 11. n. (4). There seems to be a mistake in the report in Sayer. Dennison J. is made to say, "But as it is "not expressly called a township or "vill in the appointment, the court "ought" [*not*] "to intend that it is a "township or vill in order to make an "appointment good which is not warranted by that statute." The word not is omitted where it is here inserted in italics, and seems to be required by the obvious sense of the passage.

(3) Rex *v.* Justices of Middlesex, 1 Const. 39. Pl. 62. Skillington v. Norton, Freem. 412.

(4) Per Lord Mansfield, Peart *v.* Westgarth, 3 Burr. 1610. 1 Bott, 37. Pl. 59. Rex *v.* Uttoxeter, Doug. 246. Cald. 84. S. C. 1 Bott, 41. Pl. 62. Per Grose J. Rex. *v.* Newell, 4 Term Rep. 266, 1 Bott, 58. Pl. 69.

and

and payed within his own division; at the end of the year if there was a surplus in the hands of either, so much was paid over to the other as to make both equal; and there was but one workhouse which the overseers looked over by turns weekly. The court refused a *mandamus* to appoint separate overseers for a township, constituting part of the parish. For what is stated shews that the parish can do very well under 43 Eliz. c. 2. without resorting to 13 & 14 Car. II. c. 12. "To bring "it within the latter statute, they must shew it to be a "distinct vill; we expected they would have shewn that "they had separate overseers, had maintained their "poor separately, and had a separate rate." (1)

Inability as a parish must appear.

The inability of a parish to sustain its poor under the provisions of 43 Eliz. is a fact which should be distinctly stated, and may be ascertained by various circumstances. If one or more townships in the same parish are already separated, and provide for their own poor separately, it proves decisively that the parish cannot maintain their poor as a parish, and consequently cannot have the benefit of the statute (2). Another material ingredient to establish this point, although it is not so decisive a criterion, is the customary appointment of more than four overseers. (3)

Doubts as to policy of 13 & 14 C. 2. c. 12.

In some cases the court expressed an opinion that the policy of 13 & 14 Car. II. c. 12. was mistaken, and that the divisions ought rather to be enlarged than diminished.

Inability when not sufficiently shewn.

Thus where it was found by a special verdict, that the parish of Stanhope in the county of Durham, being 20 miles long and 8 broad, maintained its own poor by a

(1) Rex v. Justices of Middlesex, 1 Bott, 34. Pl. 56.

(2) See the opinion of Buller, J. Rex v. Sir Watts Horton, post. (3).

(3) Per Buller, J. Rex v. Sir Watts Horton, 1 Term Rep. 374. Per Lord Kenyon, C. J. Rex v. Newell, 4 Term Rep. 266.

general rate, and had one joint appointment of four overseers, who, with the four churchwardens, (one of each being respectively nominated out of each of four quarters or districts into which the parish was subdivided,) collected the poor's rate in the districts where they severally resided, but under one entire assessment for the whole parish, and carried it to one general fund for the joint relief of all the poor. This practice continued from 43 Eliz. until the midsummer quarter sessions for the county, 9 Geo. I. when the sessions ordered upon motion, that "the several townships or constableries within the parish "should separately maintain their own proper poor." Since that time each of the quarters or districts had overseers separately appointed, and separately maintained its poor; and orders of removal were made from one quarter to another, and appeals heard and decided thereon. But about 12 years before the present question arose, two townships or constableries belonging to one of these quarters separated themselves from the remainder thereof, and have ever since maintained their own poor separately. The question was, whether the several places or districts were one entire parish, town, township or village, within the 13 & 14 Car. II. c. 12. The court were of opinion after two arguments, that to subdivide a parish it should appear that there was an inability in the parish to have the benefit of the act of 43 Elizabeth; that no such inability appeared, but quite the contrary for above one hundred and twenty years, so that there is no foundation for the division: that the acquiescence under the division by the order of sessions, was upon a false notion that the sessions had power to make it, which they had not; for it was a mere nullity, not being made upon appeal, but upon a motion on behalf of one of the quarters and opposed by the other; and there is no inconvenience in setting right this wrong usage which had obtained for 40 years, but cannot vary the right. (1)

(1) Peart *v.* Westgarth, 3 Burr. 1610. and see Rex *v.* Beeding, Cald. 90. post. 23.

So

So where a parish five miles in length and five in breadth, contained five townships, Uttoxeter, Crakemarsh, Creighton, Stramshall and Loxley, which jointly maintained their poor until 1730. From 1643 to 1703 two overseers were elected for Uttoxeter, one for Loxley, one for Crakemarsh, Creighton and Stramshall, and one for Woodlands, which is part of the township of Uttoxeter. From 1703 to 1727 only two were elected for the parish. In 1730 a rate for the whole parish was signed by two justices, in pursuance of a *mandamus*. In 1731, upon appeal by three townships, against a rate made for the whole parish, an order of sessions quashed the assessment, so far as it charged the inhabitants of those townships in respect of property situated there, towards the maintenance of the poor of the parish, and this part of the order was afterwards affirmed in the court of king's bench. In 1733 a *mandamus* issued, directing the appointment of two or more overseers for the parish. In 1734 two overseers were appointed by separate appointments for each township. These appointments were removed the next term by *certiorari* into B. R. and affirmed, no opposition being made; since when separate overseers had been appointed for each township, and they had separately maintained their poor. An appointment of distinct overseers for these townships was confirmed at sessions, subject to a case, which stated these facts. Being removed into the king's bench, the court quashed the order of confirmation. For though there were separate overseers from 1643 to 1703, yet all the townships, during that period, jointly relieved their poor, and a subsequent acquiescence in the contrary for 40 years will not alter the law. The confirmation of the appointments in 1734 was of no authority, the question not having been raised; and the inability to receive the benefit of the act must appear, which is not here shewn. (1)

Inability not shewn.

(1) Rex v. Uttoxeter, Doug. 246. Cald. 84.

Removals from districts to other parishes, &c.

The parish of St. Giles, Reading, consists of one district, situate within the borough of Reading, and of another situate within the hamlet of Whitney, which lies without it. There is but one church, but the hamlet had a constable and churchwardens from time immemorial, and separate overseers from 1648. These districts made separate rates as far back as evidence went; but in conformity to an order of sessions made in 1649, one of them paid three eighth and the other five eighth parts to the whole expences of the poor of both parts of the parish, the whole expences when incurred, being computed into one integral sum. The overseers for each, after relieving their own poor, accounted with the other reciprocally for any surplus or deficiency in their proportion. The overseers for W. relieved their own poor separately, and kept separate accounts, which were separately allowed by two justices. Certificates had been granted by W. and other parishes had removed paupers thither, and received them thence, but this did not appear to have taken place as between the hamlet and the rest of the parish. For several years the poor had been jointly maintained in a poor-house to which the hamlet and borough part of the parish contributed in the stipulated proportion of 5 to 3, and the inhabitants of the hamlet have constantly attended the vestry-meetings of the parish.

Per Lord Kenyon C. J. On the facts disclosed in this case, it does not appear that these two districts which compose one parish cannot have, nor is it stated in point of fact that they have not had the benefit of the 43 Eliz. but on the contrary, almost every fact in the case goes to establish this point, that they have squared their conduct rather by that statute than by the statute 13 & 14 Car. II. c. 12. For if they had proceeded on the latter, there would have been no communion between them, and they would have acted to all purposes, as if they had been perfectly distinct parishes. It is indeed stated, that there have

have been removals to *Whitney* from several different parishes; but it is not pretended that there ever was one from St. Giles's Reading. — Probably distant parishes may have been deceived by these districts having separate overseers, and have concluded from thence that they were separate parishes; but their misconception cannot vary the case. — The material facts in this case are all included in those few lines which follow the order in 1649. — To that order I only refer as a date in the case; for it is extrajudicial: but it is stated, that "ever since that order was made, the directions contained in it have been observed by the two parts of the parish of St. Giles, in regard to the respective contributions to the poor; that they have paid accordingly, the hamlet three-eighths, and the borough part five-eighths, of the whole expences incurred by the poor of both parts of the parish; *the whole expences, when incurred, being computed into one integral sum;* and that the overseers of each part have accounts with each other." Then it appears to have been only one district, affording one integral fund for the poor of both parishes; and that when one part has overpaid its proportion, the other has repaid it; but it was merely for their own convenience that they have subdivided themselves, as is frequently done in other parishes, where one overseer agrees to superintend one part of the parish, and another the rest. But with regard to the proportions, agreed upon in 1649, which each district was to pay, those, indeed, would not be binding at this time, if, upon enquiry, it should appear that they are unequal, considering the present circumstances of the parish. If that had appeared in the case which is attempted to be inferred from it, that these districts cannot reap the benefit of the statute of 43 Eliz. c. 2. the objection would be well founded; but it appears that they have had the benefit of that statute. The only circumstance that can bear the semblance of an argument against this decision is, that these districts have had more than four overseers, but that appeared to be the

Agreement by districts to pay in proportions, how far binding.

case in several other parishes, on an inquiry directed by Lord Mansfield in Rex *v.* Loxdale; so that though it may be a very material ingredient in these cases, it is not a decisive one. As, therefore, it is not stated as a fact in the case that these districts cannot reap the benefit of the 43d Eliz.; but it appears, on the contrary, from all the facts, considered together, that they had the benefit of it, we should overturn all the authorities, if we were to determine that these districts might now be subdivided.(1)

Appointment of overseers for 40 years insufficient.

It may be collected from the foregoing determinations, that the continued appointment of overseers for separate townships for forty years is not a decisive reason for dividing a parish into townships, as being unable to receive the benefit of 43 Eliz. c. 2., and that such an appointment derives no additional validity from a confirmation in the court of king's bench, unless the court's attention has been particularly drawn to the point.(2)

Townships in different jurisdictions.

It seems also to have no great weight that the townships of the parish are situate within different jurisdictions(3); or that they have separated in obedience to an order of sessions, which being extrajudicial, is of no authority.(4)

The court of quarter sessions, upon an appeal against a rate for the entire parish of Beeding, stated the following case:—

Separation on bond to indemnify.

The parish of Beeding is a large parish, part of which is called the tything of Bewbush, which is twenty miles from the parish church, "*and cannot* reap the benefit of

(1) Rex *v.* Newell, 4 Term Rep. 266.

(2) Rex *v.* Uttoxeter, ante, 19. See post. 29.

(3) Rex *v.* Newell, supra. Lane *v.* Cobham, 7 East, 1.

(4) Peart *v.* Westgarth, ante, 18. Rex *v.* Newell, supra (1).

43 Eliz. without inconvenience." The tything was rated with the rest of the parish in one rate until 1758, when upon an appeal by F. S. against a rate, an order of sessions was made by consent of all parties that the poor's rate be quashed as to the inhabitants of Bewbush tything, F. S. undertaking to pay the other part of the parish what they had paid in support of the poor of the tything, and also to enter into a bond to the inhabitants of the parish, except the tything, to indemnify them against all charges respecting the poor of Bewbush, the said parishioners undertaking not to include Bewbush in their rate, and that different officers shall and may be appointed for the tything.

From that time the tything has never been rated to the parish, and has maintained its poor separately. But it did not appear whether the bond had been entered into, or whether any overseer had been appointed, or a poor rate made for the tything until 1772, when the tything was included in a rate made by the parish.

The sessions having quashed the rate as to Bewdly tything, the court of K. B. quashed their order, and affirmed the rate. The order of sessions is every way wrong. The rate for the whole division could only have been quashed; for it was by agreement only that this separate division could exist as such, and that agreement could not have that effect, as never having been carried into execution. (1)

Population decreased, and removals between townships.

A poor's rate was appealed against, as being made for the township of Beddington, when it ought to have been made for the whole parish. The sessions disallowed the appeal, but stated the following case for the superior court's opinion:

(1) Rex v. Beeding, otherwise Seal, Cald. 90.

Previous to 1739, the six townships of Beddington parish were united, and the poor were maintained by a rate made on the whole parish by four churchwardens and two overseers appointed for the whole parish. From 1739 to 1753 it did not appear by what rate the poor were maintained, or how overseers were appointed. Since 1753, the parish has been divided into six townships, each of which had separate overseers, and maintained its poor by a separate rate. In 1798 two orders of removal were made, one from the township of B. to that of N., and the other from that of N. to B., both of which were acquiesced in. The parish is five miles in length and three in breadth, and has rather decreased in population.

Lord Ellenborough, C. J. Down to the year 1739 it is certain that the parish had the benefit of the stat. 43 Eliz., and it does not appear but that they had the same down to 1753; and since that time it appears that the population of the parish has decreased: from all which I should be led to conclude, that they might the more easily have the benefit of the statute. I know that different opinions have at different times prevailed as to the better policy of providing for the poor in larger or in smaller districts; but I had rather guide myself by the words of the act of Parliament and by the facts, than by any fluctuating policy, which sometimes leans one way and sometimes another. Whether a parish can or can not have the benefit of the statute, is a fact which the sessions ought to find upon all the circumstances laid before them, and not leave us to presume it how we may (1). Then, have the sessions here found the fact? or have they stated those facts from whence we must necessarily see that the parish can not have the benefit of the statute? They have not done either. The case must go back to them to find the fact (2).

(1) S. P. Per Buller, J. Rex *v.* Uttoxeter, Cald. 87. But see post. 27.

(2) Rex *v.* Watson, 7 East, 214.

At

At the Old Bailey, in London, a case was referred to the justices, which was this:—One Fletcher, a widow, having several children by her former husband, who lived in the parish of St. Botolph, without Aldgate, which lies in two counties, viz. London and Middlesex, marries a second husband, and then they put the children to nurse at Enfield, in Middlesex, and then the mother dies, and after her the father-in-law. The nurse applies for money to the parish of St. Botolph, which hath one church-warden and several overseers of the poor of the county of Middlesex and city of London, and the parish rates are several. The woman lived and died in that parish which lies in Middlesex, who contended with the other part of the parish in London; and upon application to the quarter sessions in Middlesex, the justices of peace there ordered that that part of the parish which was in London should go equal charges in relieving these children; and that part of the parish which is in London, not satisfied with the order, applied themselves to the gaol delivery at the Old Bailey, and there resolved by Pemberton, C. J. Dolben, and others, justices there, that without any particular usage to the contrary, the parish in both countries ought to contribute their shares towards the relief of the children, because the statute of 43 Eliz. cap. 2. names only parishes. But in regard it was made appear, that each part of the parish had distinct officers, and made distinct rates, and had used, time out of mind, to make distinct accounts to the justices of each county, the court did look upon each division as a separate parish, and therefore ordered, that the part of the said parish which lies in Middlesex shall pay the nurse and provide for the future for the children.(1)

Districts in different counties.

It appears from these cases, that a recent separation between the component townships of a parish, is not

Recent separation immaterial.

(1) Sir T. Raym. 476. The authority of this decision is recognized by Lord Kenyon, C. J. Rex *v.* Newell, 4 Term Rep. 266. ante, 22.

considered

considered as near so convincing a proof of its inability to reap the benefit of the statute, as the antecedent maintenance of its poor as a parish before and after the 13 & 14 Car. II. c. 12. is, that it may still continue to do so without having recourse to the latter act.

Facts necessary to separate townships originally united.

To enable the townships of a parish, therefore, to separate from each other, where it appears that the parish has had the benefit of the 43 Elizabeth, it must be shewn, that from an increase of population, or some other cause, it is impossible that they can continue to reap the benefit of that statute. (1)

Long separation material.

A long separation of distinct vills, and their being in the habit of managing and supporting their poor exclusive and independent of each other by distinct officers, and by a separate rate, is the best and most decisive evidence of the necessity of recourse to the 13 & 14 Car. II. c. 12.

Also where a parish 5 miles in length and 4 in breadth, consisted of 8 townships, and that of Euld being one for 60 or 70 years (*and before for any thing that appeared to the contrary*) had separate overseers, a separate constable, and separately maintained its own poor, and in one case a pauper was removed from the parish to this township without an appeal, the court affirmed an order of sessions quashing a rate made for the entire parish. (2)

Recent opinion as to policy. 13 & 14 Car. 2. c. 1, 2.

The judges in one case intimated, that notwithstanding what had been laid down in Peart *v.* Westgarth (3), that the 13 & 14 Car. II. had proceeded upon an erroneous policy, it was their opinion that the poor were better maintained in small districts, where officers are more attentive to their duty, than in large ones. (4)

They

(1) Per Ashhurst, J. Rex *v.* Leigh, 3 Term Rep. 746. And see the opinion of Buller, J. Rex *v.* Sir Watts Horton, ante, 17.

(2) Rex *v.* Leigh, 3 Term Rep. 746.

(3) Ante, 17, 18.

(4) Rex *v.* Leigh, *supra*. But the opinion of Lord Mansfield is contrary.

Rex

They remarked also in furtherance of this principle, that wherever parishes come within the reason of 13 & 14 Car. II. they may be still subdivided without regard to their former ability to reap the benefit of the 43 Eliz. except so far as it may affect the proof of their present inability, in the manner already stated. Or as it is expressed by Mr. J. Buller, "Though it should appear that a parish "had enjoyed the benefit of the 43 of Eliz. yet if they "could not now *conveniently* maintain their own poor "jointly, we would permit them to divide themselves, if "it contains such legal divisions as will admit of it." (1)

Parishes may be still subdivided.

But in one case, where the quarter sessions found that the parish could not reap the benefit of the statute without inconvenience, the court of king's bench laid no stress upon the circumstance. (2)

Where a parish consists of several townships, some of which are actually separated, and have distinct overseers under 13 & 14 Car. II. the Court will consider the remainder as entitled to have distinct officers appointed, whenever they think proper to apply. (3)

Rex *v.* St. Peter & St. Paul's, Bath. Cald. 213. post. & see that of Lord Ellenborough, Rex *v.* Watson, 7 East, 217. ante, 24.

(1) Rex *v.* Leigh, Ibid. But see ante, 24.

(2) Rex *v.* Beeding, ante, 25. See also the opinion of Lawrence, J. Rex *v.* Watson, 7 East, 217. The legislature seems to have been in favour of the policy of maintaining the poor by large districts if we can draw a conclusion from the statute, which enables parishes to unite in maintaining their poor.

(3) It appeared by the affidavits for the rule, that the parish of Middleton consisted of eight townships, each of which had immemorially a separate constable; two of them from time immemorial, and Ashworth, for 70 years, had separate overseers. Before the separation of Ashworth, there was a joint appointment of six and afterwards of five overseers, for the remaining townships, for which one general rate was made, but each overseer acted within his own township, and at the end of the year there was a general settlement, and the expences borne equally by all. It was further sworn, that the parish could not reap the benefit of the statute, on account of its largeness and great population. Rex *v.* Sir Watts Horton, 1 Term Rep. 374.

But

But the court won't disturb the division when made.

But although a parish has resorted to the provisions of 13 & 14 Car. II. c. 14. and maintained its poor by separate districts, it is competent to the parish to cease acting under the stat. of Car. II. and to recur to the provision of the 43 Eliz. Formerly the court did not seem inclined to disturb the ancient separation of parishes into townships, although a reunion might enable the parish to support its poor with more convenience. Lord Kenyon stating that "the question is, whether at the time of "passing the statute of Charles the 2d, the district was "in a situation to receive the benefit of the 43d Eliz. "c. 2.; for if the parish were properly divided at that "time, nothing which has happened since will induce "the court to make any innovation;" and Mr. J. Buller observing, "that though it was found that it was for-"merly inconvenient to the parish at large to maintain "their own poor, and though it was convenient to do so "now, yet they would not assist in overturning the old "practice, which might operate to the discouragement "of individuals in reducing the poor rates in small dis-"tricts." (1)

But this question of discretion.

But the court's power in this respect is altogether a question open to their discretion, the exercise of which must depend upon the facts of each particular case.

Parish may reunite.

The competency of the parish to reunite by voluntary agreement, for the purpose of maintaining its poor by one joint rate, under the management of joint overseers, was determined in the following case:

An action of trespass was brought to try whether a rate made by four overseers appointed for the whole parish of Wokingham was good, or whether three several rates for so many divisions of the parish ought not to have been made by separate overseers appointed for each. It was proved at the trial, that from all antecedent time down to the year 1773, the parish of Wokingham, which was five miles

(1) Rex v. Leigh, 3 Term Rep. 746. Ante, 26.

long and three broad, had been divided into three districts, each of which had maintained their own poor separately; one consisting of the corporate town of Wokingham, which lies for the most part in the county of Berks, with a small part in the county of Wilts: the second, consisting of such remaining part of the parish as lay in the county of Berks, called the Berks liberty: the third, called the Wiltshire liberty, lying in Wilts. During that time there had always been separate overseers of the poor for each part; two for the town, two for the Berkshire part, and one for Wilts; separate rates and constables appointed, and there had been removals of paupers, and certificates granted from each of these parts to the other. In 1773 the town of Wokingham and the Berkshire district agree to unite, and invited the Wilts district to accede to the union, which the latter did in 1775. For the purpose of sanctioning such union a mandamus was applied for to the court of king's bench, commanding two justices to appoint four overseers for the whole parish (1), to which no opposition or return was made; and from that period to the present time there had always been four overseers and no more appointed for the whole parish, who had made one rate, and conformed in all respects to stat. 43 Eliz. c. 2.

Mr. B. *Graham*, who tried the cause, was of opinion at the trial that it was competent to the inhabitants of the parish in the years 1773 and 1775, to come to the agreement which they did, (laying no stress on the mandamus, which he thought arose out of the agreement) such agreement being in conformity to the general provisions of the stat. 43 Eliz. for the management of the poor, from which the parish had deviated without autho-

(1) This is a mistake in the report, the mandamus was to the churchwardens and overseers to make one rate for the parish. See Rex v. Palmer, 8 East, 416. post. 30.

rity,

rity, from that period to the passing of 13 & 14 Car. II. c. 12. s. 21. which first sanctioned such a deviation; but that they were not bound to continue under the direction of the latter statute, if in point of fact the parish could avail itself of the provisions of the general antecedent laws, the 13 & 14 Car. II. only applying to such parishes as have not and cannot reap the benefit of the 43 Eliz. and in the present case he thought that the uninterrupted usage for the last thirty years went to shew that the parish could have, because they in fact had it for that time. The jury found for the defendants under this direction; but also found as a fact, that prior to the agreement in 1773—5, the three districts had always maintained their poor separately under separate overseers.

On a motion for a new trial, the court of king's bench were clearly of opinion that the question was proper to be left to the jury, and that it was their province to decide whether the parish, under these circumstances, could have the benefit of 43 Eliz., and there was no evidence to shew they could not, opposed to the weight of usage for thirty years past, to shew that they might have, and actually had enjoyed the benefit of it. That the agreement in 1773—5 shewed that, in the opinion of the parishioners at that period, they might have the benefit of the statute; and it now appeared that they had in fact acted under it ever since. There seemed therefore to be no reason for disturbing the practice which had prevailed for so long a time, or scrutinizing every part of the direction, when the learned Judges' opinion and the verdict were substantially right. (1)

This case was afterwards brought before the court for a revision of their opinion, in the shape of a motion for a mandamus to two justices of the peace, commanding them to appoint two or more overseers of the poor for that part of the parish of Wokingham which lies in Wilts.

(1) Lane *v.* Cobham, 7 East, 1.

The affidavits in support of, and against this rule, set forth several circumstances in addition to what appear in the foregoing case, and threw considerable doubt upon the fact, whether these three districts maintained their poor separately, at the time of passing the 13 & 14 Car. II. But it is unnessary to state them, beyond what is noticed in the following judgment, pronounced after the court had taken time to consider the case. Lord Ellenborough, C. J. "This was an application to appoint separate overseers for the three several districts and divisions within the parish of Wokingham, in the several counties of Berks and Wilts, under the stat. 13 & 14 Car. II. c. 12. s. 21. upon the alledged ground, that the inhabitants of that parish "had not nor could" reap the benefit of the stat. 43 Eliz. Whether the parish had or could have the benefit of stat. 43 Eliz. at the time of the passing of the stat. 13 & 14 Car. II. appears doubtful upon the evidence laid before us in the affidavits on both sides. From the bonds of indemnity given by one part of the parish to another during the early part of the 17th century, prior to the year 1638, it is clear that the whole parish did not then maintain its own poor jointly, and *as a parish*. In the year 1638, which is a period nearest to the year 1662, the date of the statute 13 & 14 Car. II., it appears that the sessions made an order for a joint rate, and if that order had been obeyed, (as in the absence of contrary evidence it may be presumed to have been,) the mode directed by the 43 Eliz. was more likely to have been acted under and at immediately after the time of passing the stat. of Charles, than any other less authorized mode of maintaining their poor. But supposing it were otherwise in point of fact, and that the parish, at the time of passing the statute of Ch. II. was not in a situation conveniently to reap the benefit of the stat. 43 Eliz. *i. e.* by a joint parochial rate for the maintenance of all its poor, under the joint management of not more than four overseers in the whole; and supposing

posing the poor to have been immediately thereafter maintained by three separate districts and divisions, as it is now sought that they should be, the question is, whether it were not competent to the parish, if they found it more convenient so to do, to cease acting under the stat. of Charles II., and to recur to the provisions of the stat. 43 Eliz.? There is nothing in the language of the act which imports that parishes were in this respect then immediately to adopt that mode of maintenance for their poor, from which they should not afterwards be at liberty to depart. No decided case has excluded this provision from receiving a prospective construction. The words "have not" were of themselves sufficient to cover any then actually existing case, in which parishes did not reap the benefit of the stat. 43 Eliz. The word "cannot" though in its strictest grammatical sense it applies properly to present time, yet familiar instances occur in which the word is used prospectively; and as the varying circumstances of parishes may make the provisions of the statute of Car. II. as necessary in respect to future cases, as those which existed at the time of passing the act, we think sound construction requires that it should be deemed applicable to both descriptions of cases. The language of Lord Kenyon in Rex *v.* Leigh, 3 Term Rep. 746., which goes furthest on this head, is rather applied to the expedient exercise of the discretion of the court, than to its legal power in this particular. Speaking of the time of passing the statute of Car. II. he says, "if "the parish were properly divided at that time, nothing "which has happened since will induce us to make "any innovation." And Buller, Justice, in the same case, considers the discretion of the court in assisting parishes to act under the one statute or the other, as fit to be governed by considerations of convenience and policy, and not as concluded or bound down by the actually existing practice at or immediately after the passing

passing of the statute of Car. II. (1) According to the construction of the statute now adopted by us, the word *cannot* must be read as *may not;* and the words "shall, "after the passing of this act, be maintained," &c. must be understood, not merely as imperative in respect to the then existing cases, but as applicable to other parishes also, which in future might be similarly circumstanced, and as ceasing to be imperative when any parish might reap the benefit of the stat. 43 Eliz. Considering it therefore as a question open for our discretion, whether we will grant mandamus for the purpose of introducing a different mode of managing the maintenance of the poor than that which obtained in this parish, without all question for the last thirty-two years, and probably even at and after the time of passing the statute of Car. II.: we cannot, in this case, discover any such preponderating reasons of convenience or policy as should induce us in the exercise of a sound discretion so to interfere: and in the absence of such reasons, we think that the rule *nisi*, which has been obtained in this case, should be discharged. (2)

But where two townships of a parish had maintained their poor separately under an agreement ever since 13 & 14 Car. II. c. 12., the court of K. B. were of opinion that their having so long conformed to the agreement was strong evidence that the parish could not receive the benefit of 43 Eliz., although the case found that the entire parish had received it; and maintained its poor jointly previous to 13 & 14 Car. II.; for so did every parish in a qualified sense, but it might be a benefit attended with such inconvenience as to make the statute of Car. II. necessary. And when the sessions had quashed a rate made upon one of the townships in contradiction to this agreement, by rating non resident occupiers for real property situated there, the court con-

(1) Ante 27, 28.

(2) Rex *v.* Palmer, 8 East, 416.

 firmed

firmed the order, observing that if the parties wished to have their opinion whether the parish could reap the benefit of 43 Eliz. c. 2., the proper proceeding would be by an application for a mandamus. (1)

Effect of the division.

When a parish has been subdivided, the separate divisions are to be considered with respect to the poor laws as separate parishes. (2)

(1) Rex *v.* Inhabitants of Foreign of Walsall. Maule and Selw. MSS.

The sessions upon appeal against a rate quashed it, subject to the court's opinion on the following case. The parish of Walsall consists of two districts, one called the township of the borough of Walsall, and the other the township of the Foreign of Walsall. The appellant, when the rate was made, was a resident inhabitant of the borough, and occupied the close in question in the Foreign, and was rated to the relief of the poor of the borough for that close, with the house he occupied in the borough. Prior to and down to the statute of the 13th & 14th of Charles 2. c. 12., the parish of Walsall received the benefit of the statute of the 43d Eliz. c. 2., and the poor of the borough and Foreign were maintained by rates made for the parish at large by the churchwardens and overseers appointed for the parish. On the passing of the statute of the 13 & 14 Charles 2. c. 12., some of the inhabitants of the parish proposed that the borough and Foreign should separate in the maintenance of their poor, and that separate overseers for the borough and for the Foreign should be appointed; this proposal was acceded to by the rest of the parish, upon condition that the ratable property of the parish, whether situate in the borough or the Foreign, should be rated to the relief of the poor of the district in which the occupiers resided: viz. If a resident inhabitant of the borough occupied rateable property situate in the Foreign, such inhabitant should be rated for it to the relief of the poor of the borough by the overseers of the borough, and not to the relief of the poor of the Foreign; and if a resident inhabitant of the Foreign occupied rateable property situate in the borough, such inhabitant should be rated for that property to the relief of the poor of the Foreign, by the overseers of the Foreign, and not to the poor of the borough. An agreement to this effect was made by the inhabitants of the parish, and in pursuance and in faith of it, separate overseers for the borough and for the Foreign were appointed, and have continued to be appointed down to the present time, and the poor of the two townships have been accordingly separately maintained, each in their own township, and have been removed by orders of removal from one to the other. This agreement has been constantly and uniformly acted upon from the first separation of the borough and Foreign in the maintenance of their poor, down to the making of the rate appealed against.

Order confirmed.

(2) Rex *v.* Kirkby Stephen, Burr. S. C. 664.

Where

Where overseers are appointed improperly, either for an extra-parochial place not being a vill; or for a vill constituting part of a parish, when it should be for the whole; or when there is one appointment for the entire parish, instead of several for the component townships; such persons as are aggrieved may discuss the validity of the order in several ways.

Remedies for not, or for improperly appointing overseers under 13 & 14 Car. 2. c. 12.

Those who wish to *annul* it, may bring the point *directly* forward.

1. *By Appeal* to the quarter sessions, for the justices in sessions have an appellant (1), but no original jurisdiction in appointing overseers (2). If the magistrates entertain any doubts upon the legality of an appointment, they should state the facts in a case, and make their order subject to the opinion of the superior court thereupon. But if the doubt be whether the place for which the appointment is made, be a *vill or township*, it seems expedient that the sessions should not adjudge it to be a *vill* even *by reputation*. For the court have in some cases held themselves concluded by that finding, and refused to exercise any judgment whether the sessions had rightly deduced the fact, from the circumstances set forth in the case (3). Indeed it seems to have been the opinion of the judges in a recent determination, that the justices ought in all cases to find as a fact whether a parish can have the benefit of the statute, and a case sent up by the justices for the opinion of the sessions was remitted back to be restated on that account. (4)

1. Appeal, against the appointment.

(1) Rex *v.* Morris, 4 Term Rep. 550.

(2) Peart *v.* Westgarth, 3 Burr. 1610. 1 Bott, 37. Pl. 59. Chilmerton & Flagg, 2 Sess. Cas. 260. Fol. 7.

(3) Rex *v.* Eyeford, when the cases had remitted to know whether the place was a vill by reputation. Cald. 542. Rex *v.* Ronton Abbey, 2 Term Rep. 202.

(4) Rex *v.* Watson, 7 East, 214. Yet quære, whether it would have been remitted, if the sessions had stated such facts as might have enabled the court to see whether the parish could or could not have the benefit of 43 Eliz.? See Rex *v.* Justices of Peterborough, ante, Peart *v.* Westgarth, ante, 33. Rex *v.* Sir W. Horton, ante, 17. Rex *v.* Leigh, ante, 26. And see post, vol. ii. Chap. 37. s. 3.

2. Removal by *certiorari*.

2d. By removing the order of appointment into the court of king's bench by writ of *certiorari*; when the court will quash it not only for such defects as appear on the face of the order (1), but upon a sufficient statement of facts disclosed by affidavit. (2)

But the court will not quash such an order after the year for which it was made has expired. (3)

3. Mandamus.

3d. By motion for a writ of *mandamus*, to be directed to two neighbouring justices, commanding them to appoint overseers for a district different from that for which the existing appointment is made, *viz.* for a township within the parish, where overseers are appointed for the entire parish (4), or the reverse, where the appointment is reversed. For wherever justices refuse to appoint overseers for a place which ought to have them, the proper remedy is by *mandamus* commanding them to do so, and if the case fall within the 13 & 14 Car. II. a *mandamus* is a writ of right, and the court must grant it. (5)

This motion should be founded on affidavit making out a proper case to call for such an extraordinary interposition by the court, and must state an application to the justices to whom the writ is to be directed, and a refusal by them to make the order; for it is not to be pre-

(1) "Quashing an appointment "where the fault does not appear "on the face of it, is *ex debito justitiæ*. But where the fault does "appear on the face of the appointment, then the party has another "remedy by action, and quashing is "not *ex debito justitiæ*." Per. Cur. Rex *v.* Butler, 1 Bott, 13. Pl. 31.

(2) Rex *v.* Great Marlow, 2 East, 244. and the cases there cited. post. 50.

(3) Rex *v.* Butler, 1 Black. Rep. 639. 1 Bott, 1. Pl. 3. 31. S. C.

(4) Rex *v.* Justices of Middlesex, 1 Bott, 34. Pl. 56. Rex *v.* Sir Watts Horton, 1 Term Rep. 374. Per Lord Mansfield, C. J. Rex *v.* Beeding, Cald. 92. But this proceeding don't apply to improper appointments for extra-parochial places.

(5) Per Curiam, *supra*, note (4), and see Rex *v.* Foreign of Walsall, ante, 34.

sumed

sumed that compulsory means are necessary to oblige magistrates to do their duty.

The court in granting or refusing this rule on the merits, must determine whether one appointment should be made for the entire parish, or whether there should be distinct overseers for the several vills which are comprehended within it. And where the material facts are sufficiently manifest from the affidavits, they will at once pronounce their judgment on the rule (1); but if there is any doubt or contradiction respecting them, the court will, by consent of parties, direct the question to be tried in a feigned issue. (2)

When the *mandamus* is ordered to go, it must be served on the magistrates to whom it is directed, and they may either return that they have appointed overseers as they were commanded, or else set forth those facts upon which they submit to the court that they cannot lawfully obey the writ. If they adopt the latter method, and state in their return a sufficient ground of defence for non-obedience, the court interferes no farther, however false that return may be. Yet if it be untrue, the party aggrieved is not without remedy. He may have an action for a false return against those who made it, in which the truth or falsehood of what is alleged, will be controverted before a jury, and if found to be false by their verdict, he shall recover damages equivalent to the injury sustained, and shall have a peremptory *mandamus* to the defendants to do their duty. (3)

4th. Those who wish to *enforce* the appointment, may do so; 4. Indictment.

(1) Rex *v.* Palmer, ante, 33. (1). Hooper *v.* Carr, 7 Term Rep. 270.
(2) Peart *v.* Westgarth, ut supra. Rex *v.* Juſtices of Glouceſter, cited
(3) 3 Black. Com. 111.

By preferring *an indictment* against the party who is appointed and refuses to take the office upon him (1). When this indictment is tried, if any difficulty should arise in point of law, the jury will under the judge's direction find a special case or verdict, for the opinion of the superior court (2); or if the defendant is found guilty by the judge's direction, the law permits that the propriety of his opinion should be discussed before the court in a motion for a new trial, upon the facts which appear from the judge's report of the evidence. (3)

It may be brought *collaterally* into question.

5. Appeal against a removal.

5th. By *an appeal* against an order of removal; for the district that removes a pauper must take care that the place to which it sends him maintains its own poor (4), and that a settlement is to be gained there. (5)

6. Against the rate.

6th. *By appeal* against the poor's rate. For it is a good ground of appeal, that the poor's rate is made for part of the parish, when it should have been made for the whole (6); or *è converso* for the whole, when it should only include a township (7); and the objection is equally fatal, that it is made for an extra-parochial place for which none ought to be made.

(1) Rex *v.* Jones, 1 Const. 337. Pl. 408. Rex *v.* Pardy, Ib. 339. Pl. 411. Rex *v.* Burder, 4 Term Rep. 778.

(2) Peart *v.* Westgarth, 3 Burr. 1610.

(3) Rex *v.* Warner, 8 Term Rep. 375. They may first remove the order into K. B., and have it confirmed. Post.

(4) Dolting *v.* Stokelane, Fort. 219.

(5) Rex *v.* Denham, Burr. S. C. 35. Rex *v.* Tamworth, Cald. 28. 1 Bott, 40. Pl. 61.

(6) Rex *v.* Watson, 7 East, 214.

(7) Rex *v.* Leigh, 3 Term Rep. 746. Rex *v.* Newell, 4 Term Rep. 266. But see the opinion of Lord Mansfield, Ch. J. Rex *v.* Beeding, Cald. 92.

7th. By action of trespass (1) or replevin (2), where the rate is attempted to be enforced by distress; for the rate being made for an improper district, is altogether void, and consequently the distress is illegal, being taken without due authority. 7. Action.

(1) Hilton *v.* Pawle, Cro. Car. 92. 338. 2 H. Black. 267. Tracy *v.*
(2) Rudd *v.* Foster, 4 Mod. 157. Talbot, Salk. 532. Lane *v.* Cobham, Lord Bute *v.* Grindall, 1 Term Rep. 7 East, 1.

CHAPTER II. PART II.

Of appointing Overseers, and their Duties.

Overseers.

OVERSEERS of the poor are, 1. The church wardens (1): 2. Inhabitants who are specially appointed to the office. (2)

Churchwardens, how elected.

Churchwardens should regularly be chosen annually in Easter week (3); they are usually two in number, one of whom, according to common right, is nominated by the parson, or in his absence by his curate (4); the other is elected by the parishioners. (5)

By custom.

Such is the general mode of election prescribed by the canons and recognized by the common law; but it may be departed from where custom has established a different method of appointing to the office.

Thus by custom both may be chosen by the parishioners without the clergyman (6), or by a select vestry (7), or by the old churchwardens (8), or by the lord of the manor. (9)

(1) By 43 Eliz. c. 2.

(2) Under 43 Eliz. c. 2. and 13 & 14 Car. 2. c. 12. s. 21. See ante, 7.

(3) 89 Can.

(4) Hubbard *v.* Penrice, 2 Str. 2. 1246.

(5) 89 Can. Hubbard *v.* Penrice, ante (3). Stutter *v.* Freston, 1 Str. 52. But it seems to have been Sir M. Hale's opinion, that of common right every parish ought to chuse their own churchwardens. Dawson *v.* Fowle, Hard. 378. See also Lord Holt's opinion, Rex *v.* Rice, 1. Ld. Raym. 138.

(6) Warner's case, 2 Cro. 532. 2 Roll. Abr. 234. Ward *v.* Brampston, 3 Lev. 362.

(7) Dawson *v.* Fowle, Hard. 378.

(8) Catten *v.* Barwick, 1 Str. 145.

(9) 1 Burn's Ecclesiast. Law, Tit. Churchwardens, cites Godb. 153.

But

But such customs are to be construed strictly; for if through disagreement of the electors, or other circumstances, the customary method of election cannot be followed, the custom is thereby laid out of the case, and the parish must elect according to the canon. (1)

Where the right of appointing exists in the parishioners, it is vested in the whole assembly, who are all upon an equal footing, so that not only the power of election, but likewise that of adjourning the meeting, resides in the majority of those assembled, and neither the parson nor his churchwarden possesses any right to preside in the assembly, or to adjourn the poll (2); and the bishop's court cannot try the legality of the votes. (3) Voters equal in power.

No person who lives out of the parish is eligible as churchwarden, although he occupies lands within it (4), and many residents are exempted from serving the office by the common law; such are peers, members of parliament, and clergymen (5), attornies (6), and clerks of the king's bench (7). Others are privileged by statute, as apothecaries (8), freemen of the surgeon's corporation in London (9), dissenters (10), those who prosecute a felon to conviction (11), Roman Catholic ministers taking the oath and conforming to the regulations specified 3 Geo. 3. c. 32. Sergeants, corporals, drummers, and privates in the militia from their enrolment until their discharge. (12)

Churchwardens must be sworn into the office before they can take its duties upon them. The archdeacon is Sworn in.

(1) Catten *v.* Barwick, ante (7).
(2) Staughton *v.* Reynolds, 2. Str. 1045. Fort. 168. Cas. Temp. Hardw. S. C.
(3) Per Ld. Mansfield, C. J. and Wilmot, Rex *v.* Harris, 3 Burr, 1422.
(4) Gibs. 215.
(5) Ibid.
(6) Wilson's case, 2 Roll. Abr. tit. Privilege—272, Barber's Case, Ibid.
(7) Stampe's Case, 2 Roll. Rep. 368. Palm. 392. S. C.
(8) 6 C. 3. c. 4.
(9) 18 G. 2. c. 15.
(10) 1 W. & M. c. 18.
(11) 10 & 11 W. c .25, See post 43.
(12) 26 G. 3. c, 107. s. 130.

to

to administer the oath, and his function is altogether ministerial, so that whatever reasons there may be to doubt of the party's qualification for the office (1), or the validity of his election, he cannot inquire into these matters, nor refuse to swear him in on these accounts (2). By the canon 1 Jac. 89., churchwardens shall continue in office but one year, except chosen again in like manner(3). But this refers only to the period at which others should be appointed in their stead, for when once sworn in they continue in office until those who are chosen to succeed them, are in the same manner sworn in. (4)

Mandamus to compel election.

If those persons who ought to chuse churchwardens neglect to do so at the proper season, they may be compelled to it by a writ of *mandamus* issuing from the court of king's bench (5); and if the archdeacon should refuse to swear those who are chosen, that court will grant the writ to oblige him to administer the oath. (6)

Overseers, by whom appointed in parishes and vills.

The appointment of overseers for parishes (7) or townships (8), is to be made in counties by two or more justices of the peace.

In places corporate.

In towns and places corporate and cities, it is to be executed by the mayors, bailiffs and other head officers, being justice or justices of peace, and no other justices of peace to enter or meddle there (9). But it cannot be made by the head officer alone if there are other corporate justices, the signature of two magistrates being necessary in that case, as well as in counties. The statute only means to give justices, in corporations, and head of-

(1) Rex. *v.* Rice, 1 Ld. Raym. 138. 1 Salk. 166.

(2) Rex *v.* Simpson, 1 Str. 610. Rex. *v.* White, 2 Ld. Raym. 1326. See the distinction taken by Lord Holt, Rex. *v.* Twitty, 2 Salk. 433. Also Fitzg. 195.

(3) 3 Com. Dig. Eglise, (F 1.)

(4) 188 Can. 1 Burn's Ecclesiast. Law, Tit. Churchwardens.

(5) Stutter *v.* Freston, 1 Str. 52.

(6) Rex *v.* Dr. Harris, 3 Burr. 1420. 1 Burn's Eccles. Law, Tit. Churchwardens. 1 Com. Dig. Tit. Mandamus (A).

(7) 43 Eliz. c. 2. s. 1.

(8) 13 & 14 C. 2. c. 12. s. 21.

(9) 43 Eliz. c. 2. s. 8.

ficers

ficers where there are no justices, the same power as justices in counties; in sessions (where there are justices) as well as out of it. (1)

In London.

But an alderman of London has power given him expressly by the statute, of doing and executing in every respect so much as is appointed and allowed to be done by one or two justices of a county. (2)

In parishes extending into more counties than one.

When a parish extends into more counties than one, or part lies within the limits of any city, town, or place corporate, the justices of the county and head officers of the city shall, within their several limits, wards, and jurisdictions, execute the ordinances respecting overseers; but the churchwardens or overseers, or the most part of them of the said parishes, shall, without dividing themselves, execute their office in all places within the said parish. (3)

When to be appointed.

This appointment is to be made yearly, in Easter week, or within one month after Easter (4); and if neglected, the justices dwelling within the division, and every mayor, alderman and head officer, of city, town, or place corporate, where the default shall happen, is to forfeit 5l. for every such default, to the relief of the poor, to be levied by the parish officers by distress, under a warrant from the quarter sessions. (5)

5l. penalty for default.

But subsequent appointment good.

But the statute is only directory, in commanding the justices to appoint within the month, and imposing the penalty on those who neglect it. The court of king's bench will not quash an appointment because subsequently made. For the act has no negative words restricting the power to a month after Easter, and should be construed so as to destroy the mischief and advance the remedy

(1) Rex v. Butler, 1 Black. 649. 1 Bott, 13. Pl. 31.
(2) 43 Eliz. c. 2. s. 8.
(3) Ibid. s. 9. Ante, p. 8.
(4) 43 Eliz. c. 2. s. 1.
(5) Ibid. s. 10.

which

which was to have proper officers set over the poor. But if a subsequent appointment was to be void, it would subject the parish to the inconvenience of wanting overseers, by a default of the justices, which it was not in its power to prevent. (1)

Mandamus to compel an appointment after the month.

After the month is expired, and no officer appointed, the court upon application will grant a *mandamus* to compel the magistrates to make one.

Where an overseer dies or removes, power to appoint another.

If an overseer dies, or removes from the place for which he is appointed, or becomes insolvent, two justices may, on oath thereof, appoint another in his stead to continue till new ones are appointed. (2)

This power discretionary in the justices.

The appointment of fit persons for the discharge of this office, is a discretionary power vested in the justices, who are to select such householders as they think most proper, having respect to the circumstances of the place and condition of the individual (3). To enable them to make a fit selection, it is usual for the existing overseers, some time before the expiration of their year, to form a list of a sufficient number of substantial householders within the parish, proper to succeed to the office. Where this is not done voluntarily, the justices generally issue a precept to the high constable of the division, or constablewick, commanding him to issue his warrant to the petty constables of those places in which it has been omitted, requiring them to give the overseers notice, that they shall forthwith deliver the same. (4)

Number of overseers.

The 43 Eliz. directs that the overseers for parishes "are to be four, three, or two substantial householders,

(1) Rex *v.* Sparrow, 1 Bott, 21. Pl. 39. 2 Str. 1123.

(2) 17 G. II. c. 38. s. 3.

(3) Rex *v.* Chardstock, 16 Vin. Abr. 415. Rex *v.* Stubbs, 2 Term Rep. 395. Rex *v.* Forrest, 3 Term Rep. 38.

(4) See Burn's Justice, Tit. *Poor* (Overseers).

"having

"having respect to the proportion and greatness of the "parish (1)," and 13 & 14 Car. II., that there shall be "two or more for townships or villages (2);" More than four (3), and less than two (4), cannot be appointed. For the number descending in the act of Elizabeth, shews that it was the intent of the legislature, to prevent the appointment of a greater number to a burthensome office, not likely to be better executed by many than by few. This construction is strengthened by reference to sect. 18. which empowers the justices to appoint such a number of overseers for the island of Fowlness, as the exigence of the place shall require (5). And no usage in the parish to have a greater number, can legalize an appointment of more, or control the expressions of the statute. (6)

Appointment of five.

An appointment therefore of five overseers is void for the whole; for being entire and relating to all equally, none of those chosen are entitled to preference, and it must be good or void altogether. (7)

It has been held likewise, that the churchwarden cannot be chosen an overseer for the same parish during his continuance in office. (8)

Appointment of one overseer.

But though there must be more than one overseer, yet an appointment of one is not bad on the face of it, or

(1) 43 Eliz. c. 2. s. 1.
(2) 13 & 14 C. II. c. 12. s. 21.
(3) Rex *v.* Harman, 1 Bott, 16. Pl. 33. Rex *v.* Loxdale, 1 Burr. 445.
(4) Per Lord Hardwicke, C. J. Rex. *v.* Denham, Burr. S. C. 35. Per Lord Kenyon, C. J. Rex *v.* Morris, 4 Term Rep. 550. Decided Rex *v.* Clifton, 2 East, 168. As to the overseers of a township under 13 & 14 Car. 2. But doubted by Lord Mansfield, Rex *v.* Eyford, Cald. 542.
(5) Ut in n. (2).
(6) See Rex *v.* Harman, 1 Bott, 16. Pl. 33. Rex *v.* Loxdale, Ib. 18. Pl. 35.
(7) Ut in n. (2). Rex *v.* Wymondham, 6 Term Rep. 552. and the opinion of Lawrence, J. Rex *v.* Clifton, 2 East, 175.
(8) Rex *v.* All Saints, Derby, 13 East. 143.

unless

unless it appears that no other is appointed by some other order (1); for there is no law which says that there shall be an appointment of two or more overseers *uno flatu*, or at the same time (2), much less by one and the same instrument. (3)

Their condition. Substantial householders.

They are to be substantial householders. But the word *substantial* is a relative term. The appointment therefore in an extraparochial place of Mrs. Stubbs, who occupied the greatest part of the land there, and of one Miles, who occupied a small house which he rented, with something more than an acre of land, he *being poor and a servant* to Mrs. Stubbs; together with one Keeling, who *was a labourer and poor*, but the house in which he lived being his own property, was held a good appointment of substantial householders to serve the office, there being no other persons in the township. "If there were a great many opu-"lent farmers, the appointment of a day-labourer might "be improper; here there were no other persons to serve. "They are both householders, with some land annexed "to their houses, and one of them a proprietor. No "better persons can be had than the place affords, and "the want of them is no reason why the poor should "not be provided for." (4)

A woman may be appointed.

It was also held in the same case, that a woman was not incompetent to the office by reason of her sex, and that her appointment was good from necessity, where there was not a sufficient number of male householders to execute it. But where there are a sufficient number of men qualified to serve, they are more proper, and the justices being vested with a discretionary power of approbation,

(1) See Rex *v.* Clifton, ut supra.
(2) Per Denison, J. Rex *v.* Besland. 1 Bott, 17. Pl. 34.
(3) Rex *v.* Morris. 4 Term Rep. 550.
(4) Rex *v.* Stubbs. 2 Term Rep. 395.

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are not likely to approve of a female appointment where there are other proper objects. (1)

Who are exempt from the office by common law.

Some persons are exempted from the burthen of this office by their necessary attendance on other public duties: such as practising barristers (2) and attornies (3). A clergyman, though he has no cure of souls (4); the high constable in a different hundred (5); an officer of the customs, though he have not his writ of privilege at the time of his appointment (6); and all revenue officers, as officers of the exchequer. (7)

It is also said that occasional residents in the parish, if not absolutely ineligible, are at least improper to be chosen (8). It has been made a question likewise, whether an acting justice of the county who was also a lieutenant of marines on half pay, is exempt. As the case is reported the court gave no decided opinion on the point, but seemed to consider the situation as a good ground for selecting some more eligible person, and that it did not amount to an exemption (9). But Lord Kenyon, in adverting to the case, has observed that "In the King v. "Gayer, it seemed to be agreed that the offices of justice "of the peace and overseer of the poor were incompati-"ble, because the accounts of the latter were subject to "the control of the former." (10)

(1) Ibid. But see Rex *v.* Chardstock, 16 Vin. Abr. 415.

(2) Poordage's case, 1 Mod. 22.

(3) Although it was a special custom that every parishioner should serve the office according to the situation of his house, Rex *v.* Prowse, Cro. Car. 389.

(4) Per 3 Just: but Holt, C. J. contra, Anon. 6 Mod. 140.

(5) Anon. 28. Car. 2. 1 Jones, 46.

(6) Rex *v.* Warner, 8 Term Rep. 375.

(7) Raymond *v.* Botolph's, Aldgate, 2 Chan. Rep. 196. Cawthorne *v.* Campbell and others, 1 Anstr. 205. 216.

(8) Rex *v.* Moor. Carth. 161. 3 Com. Dig. Tit. Justices of the peace. (B. 64.)

(9) Rex *v.* Gayer, 1 Burr. 245. Post. 51.

(10) Rex *v.* Pateman, 2 Term Rep.

Some

By statute. Some persons are exempted by statute; such are the President, Commons, and Fellows, of the College of Physicians within the city of London (1), for a physician is not exempted otherwise (2). Freemen of the company and corporation of Surgeons in London, who are examined and approved; while they exercise the art (3). Apothecaries exercising the art within the city of London, and seven miles thereof, if free of the apothecaries' company; and those who use and exercise it elsewhere, if they have served seven years apprenticeship (4). Those who apprehend persons guilty of burglary, or privately stealing to the value of five shillings in a shop, warehouse, coach-house or stable, and prosecute to conviction, shall have a certificate, which shall discharge them or their respective assignees from all parish and ward offices in the parish where the felony is committed. (5)

Serjeants, corporals, drummers, and privates, in the militia, from the time of their enrolment till their regular discharge (6), are excused from serving as overseers; as are dissenting ministers taking the oaths, and subscribing the declaration and articles of the church of England required by the toleration act (7). But other dissenters who are appointed and scruple to take the office upon them, have no further privilege than that of serving by deputy, provided the said deputy is allowed and approved of by such person and persons, in such manner as the principal should by law have been allowed or appointed. (8)

(1) 32 H. VIII. c. 40.
(2) Doctor Poordage's case, 1 Mod. 22.
(3) 18 G.II. c.15. s.10.
(4) 6 & 7 W. III. c. 4.
(5) 10 & 11 W.III. c. 4.
(6) 26 G. 2. c. 107. s. 130.
(7) 1 W. & M. c.18. s. 11. although such minister is also engaged in trade. Kenward *v.* Knowles, Willes Rep. 1 Const. 14. Pl. 27.
(8) 2 W. & M. c. 18. s. 7.

As

As to the form of the order of appointment, it must be under hand and seal, and therefore in writing (1). It should pursue the words of the act, and appoint the persons named "overseers" *eo nomine*. An order, setting forth that such persons by name "were appointed to set "the poor to work, &c." mentioning the several duties imposed by the act, but not appointing them *overseers* in express terms, was quashed for this defect (2). It must also state them in the body of the order (3) to be "substantial householders;" and no other description seems equivalent; for where an order described them as "*principal inhabitants*," it was held bad (4). It must further express, that they are "substantial householders there, "or in the parish (5); and that the appointment is for a "parish (6) or township, or what is synonymous, an "hamlet (7), as the case may be." The order must likewise set forth, that the district for which it is made is within the county or corporate place over which the magistrates who make it possess jurisdiction. (8)

Form of the appointment, should name them "Overseers."

"Substantial householders."

"In the parish, and for it," &c.

But it is not necessary that it should mention the justices to be for the division, for the words of the statute are only directory (9); nor that the persons named are

(1) Rex *v.* Arnold, 1 Str. 101.

(2) Rex *v.* St. George, Fort. 320.

(3) Case of overseers of Weobly, *infra*.

(4) Rex *v.* Sherringbrooke, 2 Ld. Raym. 1394. Case of the overseers of Weobly, 2 Str. 1261.

(5) Case of the overseers of Weobly, ut supra, (4).

(6) Rex *v.* Severn and Arnold, Say. 278.

(7) Rex *v.* Morris, 4 Term Rep. 550.

(8) Rex *v.* Houlditch, 1 Bott, 4. Pl. 11.

(9) Rex *v.* Sparrow. 2 Sess. Cas. 140. Rex *v.* Loxsdale, 1 Burr. 447. This is so in all cases where the statute directs any thing to be done by justices of a *division*. Per Holt, C. J. Anon. 12 Mod. 546. 2 Salk. 473. Eliz. Ashley's case, ib. 480. Rex *v.* Sir John Price, Cald. 305. where it is observed by Aston, J., that "any justice in the county going to the meeting in the division is for this purpose," [of granting a beer licence] a justice of the division.

appointed overseers of the parish "together with the churchwardens thereof," for where overseers are legally appointed, they are by operation of law joined with the churchwardens. (1)

The time for which made.

The order must express the time for which these officers are appointed. But though they can only continue in office until the Easter ensuing their appointment, and must not be appointed for a longer period; yet if the order appoint them "for the present year," (2) or "for "this present year 1766," (3) or "for a whole year," (4) or "for one year then next ensuing," (5) or "then "next ensuing the date thereof," (6) it is sufficient; for where the expression admits of a two-fold construction, that shall be given to it by which the order may be supported, and therefore the *year* in these orders was understood to mean the *overseers' year*.

How executed.

The appointment is not only to be under the hand and seal of two justices, but they must sign and seal in the presence of each other, or it will not be good (7). Though executed

(1) Regina *v.* Searle, 1 Bott, 3. Pl. 8.

(2) Rex *v.* Sparrow, 1 Bott, 21. Pl. 39.

(3) Rex *v.* Helling, 3 Burr. 1904.

(4) Rex *v.* Jones,

(5) Rex *v.* Burder, 4 Term Rep. 778.

(6) Rex *v.* Stubbs, when the appointment was dated 6th October. 2 Term Rep. 395.

(7) Rex *v.* Forrest, 3 Term Rep. 38. Rex *v.* Great Marlow, 2 East, 244. Yet perhaps if the magistrates had actually conferred upon the appointment and concurred therein, it would be good although they signed and sealed separately. A warrant granted by commissioners of bankrupt to bring a witness before them who had disobeyed their summons, was adjudged to be good although it was signed by them when at separate places, and not at any meeting held by them as commissioners. For per Lord Ellenborough, C. J. We must consider, that in directing the warrant to be made out, they gave their officer every direction for that purpose, including the persons' names to whom the warrant was to be directed; so that when it came before them for their signatures, nothing else should remain to be done, except the mere act of signing;

executed on Sunday, yet if done *bona fide* it is sufficient, as being a work of charity (1). But it is said in a subsequent case, that the impropriety of the day renders it *prima facie* clandestine and bad (2). Thus where two adverse sets of borough justices met before midnight of Easter eve, and began making appointments of overseers the instant the clock had struck twelve, and kept on renewing the same appointments for an hour or two; and one set made a fresh appointment on Sunday morning, supposing that there would be a contest concerning the validity of the appointment made soon after midnight, and perhaps all of them bad. The appointments being removed into the king's bench by *certiorari*, and these facts disclosed by affidavit, Lord Mansfield delivered it as his opinion, in which the other judges concurred, "I don't know that there is any authority which says "that an appointment made on Sundays is good: it cer- "tainly is not a day for such purposes as these, and I "will not give my sanction to any of the appointments. "Let them be set aside, and a mandamus directed to "the justices to make a new appointment, and let the "mayor give two days notice of the time and place of "meeting for it." (3)

signing; and that need not be done together. Suppose each, immediately after writing his name, had left the room where they were assembled in the first instance, would that have avoided the warrant? Then why not sign it alone in any other place?" Battye *v.* Gresley and others, 8 East, 319. But see post.

(1) Rex *v.* Clerkenwell, Fol. 4. 1 Bott, 21. Pl. 38. Rex *v.* Merchant and Allen, 1 Bott, 25. Pl. 43. "There is a distinction between ministerial and judicial acts, for the first may be done on a sabbath day, but judicial acts may not." Per Montague, C. J. Waite *v.* inhabitants of Stokes, Godb. 280. It is clear that judicial acts done on Sunday are void. Swan *v.* Broome, 3 Bur. 1595. affirmed in Dom. Proc.

(2) Rex *v.* Butler, 1 Black. Rep. 649. 1 Bott, 25. Pl. 42. where Lord Mansfield doubts of the case of Rex *v.* Clerkenwell. But the 43 Eliz. c. 2. requires, that the churchwardens shall meet once a month on Sunday after service, to confer respecting the objects of the act.

(3) Rex *v.* Overseers of Bridgewater, Cowp. 139.

When the appointment is made, other justices cannot alter it.

When an appointment is once legally made, the magistrates are *functi officio.* If two appointments, therefore, each being of a sufficient number of overseers, are made on the same day, that which is prior in time is good (1), and the second void. And other magistrates are not only disabled from making a new appointment (2), but if a person who has been appointed applies to them to be exempted, upon sufficient cause, they cannot remove him and substitute another in his place, but he must appeal to the sessions for his discharge. (3)

Appeal against appointments.

If any "person or persons are aggrieved" by the appointment, they may appeal to the next quarter sessions, whose jurisdiction extends over the place for which they are appointed. (4)

Given to the parishioners.

This right is not only given to those who are appointed, but also to the parishioners, for they may be "persons "aggrieved" by the choice of an improper person, as if he be insolvent (5). In this appeal, the parties may go into evidence of whatever can shew a want of jurisdiction in the magistrates making the order (6), or point out the impropriety of their choice.

Power of Sessions.

The sessions, on appeal, have a right to exercise the same latitude of discretion in judging who are fit to be nominated as overseers, as the two justices had when making the original order. "They are not obliged to "give any reason for their opinion, because the legisla-

(1) Reg. *v.* Searle, 1 Bott, 21. Pl. 37. Rex. *v.* Merchant and Allen, Ib. 25. Pl. 43.

(2) Ut in n. 1.

(3) Rex *v.* Great Marlow, 2 East. 244.

(4) 43 Eliz. c. 2. s. 6. 17 Geo. 2. c. 38. As to the time of appeal, see post, vol. 11. chap. 35. sect. 7. and other proper heads.

(5) Rex *v.* Forrest, 3 Term Rep. 38.

(6) Albrighton *v.* Skipton, 1 Stra. 301, Rex *v.* Stotfold, 4 Term Rep. 601. Rex. *v.* Flisher, 1 Bott, 67. Pl. 76.

"ture

" ture has invested them, on appeal, with the power and " authority of appointing overseers."

The order which they make may be removed by *certiorari* into the court of king's bench; and though the justices are not bound to state their reasons for making it, yet they may, if they think proper, either give them as *rationes decidendi* in the body of the order, or separately in the shape of a case. If they appear in the body of the order, and are wrong, the court will quash what is manifestly made by mistake: but the bad reason ought to appear to have been their only inducement for making it; for the execution of a discretionary power should be supported, unless the whole reason is set forth, and is manifestly wrong. If there may have been other grounds, they shall be presumed to be sufficient.—Thus, where, on an appeal against an appointment of a Mr. G. the sessions stated in their order, " that G. was and is " an acting justice of the peace for the county, and also " a lieutenant of marines on half pay, and that there " are other sufficient and substantial householders " within the parish, and therefore vacate the warrant " of appointment;" the court of king's bench confirmed their order, on the foregoing principles:—" For the " whole reason is not given; they say there were other " persons qualified, and supposing Mr. G. liable to serve " the office, they might think him not so proper as many " others. (1)

Removal of order from Sessions by certiorari.

When the Court will quash.

There is also a power of removing by *certiorari* into the king's bench the original appointment, without appealing to the sessions; and when removed, the court will quash it, not only for defects appearing in the order itself, but upon facts stated by affidavit where they shew

Original removal into B. R.

(1) Rex *v.* Gayer, 1 Burr. 245. 1 Bott, 9. Pl. 20.

a want of jurisdiction or any illegal conduct in the justices by whom it is made. (1)

When to be removed.

The party aggrieved by the order, who moves to *quash* it, may remove it previous to the *next sessions* after it is made (2), unless an appeal is actually lodged, in which case it cannot be done until the sessions have made a determination upon the appeal. If a *certiorari* should be granted for the purpose by mis-apprehension pending the appeal, the court will quash it on motion, *quia erronicè emanavit* (3). But as this appointment may be removed likewise by those who wish to have it *confirmed*, they cannot bring it up in order to move for its confirmation, until the next sessions has been held, to which the appeal must be made. At least the court will not allow it to be done, when attempted for the purpose of taking away the benefit of appeal from those who are entitled thereto. (4)

Punishment of those not performing their duty.

If those who are appointed do not take one of these steps to get freed from the office; or if doing so, the original order is confirmed, they are liable to an indictment where they refuse to undertake or execute the duty (5). But they must have notice of their appointment. (6)

Their duties.

The care of the poor is intrusted to them in conjunction with the churchwardens, where there are any. They are required to meet at least once a month in the church on Sunday after divine service in the afternoon, under

(1) Ante, 34., and per Lawrence, J. Rex *v.* Great Marlow, 2 East, 247. Rex *v.* Overseers of Bridgewater, Cowp. 139.

(2) Rex *v.* Harman, And. 343.

(3) Case of the borough of Warwick, 2 Stra. 991.

(4) Rex *v.* Houlditch, Pl. 75. Rex *v.* Jones, 2 Stra. 1146.

(5) See the cases cited, ante 36., and per Lawrence, J. Rex *v.* Great Marlow, 2 East, 249.

(6) Rex *v.* Harpur, 5 Mod. 96. Fletcher *v.* Ingram, Ib. 127. cases of the election of a constable, & Rex *v.* Harman, ante (2).

the forfeiture of 20s. to the use of the poor, by every one who absents himself from these meetings without lawful cause (1); and if negligent in their office, they are subject to the like penalty for every default. The forfeitures to be levied by some or one of the churchwardens and overseers, by warrant of distress from two justices; and in defect of distress, any two such justices may commit the offender to the common gaol, there to remain without bail or mainprize, till the forfeiture shall be paid. But the person aggrieved may appeal to the quarter sessions, whose order shall bind all parties (2). The power of acting is vested in the major part (3), and they are to continue in office until the Easter ensuing their appointment, when others are to be elected. (4)

It differs in this particular from that of churchwardens, which continues not only until a successor is appointed, but until he is actually sworn in (5). The 43 Eliz. c. 2. seems to appoint them to superintend the poor, in conjunction with those who are expressly chosen for the purpose; it appears therefore as if their authority originated with the appointment of the parish overseers, and determines when that office is determined; liable however to be revived by the appointment of new overseers, if the churchwardens continue in office beyond the overseers' regular year. (6)

The most prominent points of their duty are: 1st, To make a rate in order to raise a fund for the maintenance

(1) But the penalty for not meeting in the church shall never be inflicted on the overseers of the poor of extra-parochial places, as they have no church to meet in. Rex *v.* Rufford, 8 Mod. 39. and query if in the case of townships?

(2) 43 Eliz. c. 2. s. 2.

(3) Ibid. s. 2. Rex *v.* Beeston, 3 Term. Rep. 592.

(4) Per Lee, C. J. Rex *v.* Sparrow, 1 Bott. 21. Pl. 463. ante 29.

(5) See ante, 39.

(6) Lord Ellenborough, C. J. seemed to intimate an opinion to this effect, Rex *v.* St. Margaret's, Leicester, 8 East 332. But whether they may not continue parish officers for certain purposes, see Rex *v.* Merevall, Burr. S. C. 661. post. vol. 11. 186.

of the poor. 2d, To ascertain what poor the place for which they are appointed is bound to maintain. 3d, To remove such persons as it is not liable to support so soon as they become actually chargeable. 4th, To inspect the œconomy, and administer to the wants of their proper poor. 5th, and lastly, Upon going out of office, to make up and pass their accounts, and deliver over any balance in their hands to their successor, together with the property and documents of the parish (1). These form the great outlines of the law which respects the relief of the poor, and will be treated of in the remainder of the work.

(1) See post, vol. II. chap. xxxv. & xxxvi.

OF THE POOR's RATE.

CHAPTER III.

Of making, allowing, and publishing the Rate.

THE fund raised for the general relief of the poor, is called the Poor's Rate. (1) Under what acts the rate is made.

It is made and levied in parishes within the jurisdiction of county magistrates, by 43 Eliz. c. 2. s. 1. In counties.

Within that of corporate towns, places, and cities, including the city of London by the same act, sect. 8. In corporate places.

And by 13 & 14 C. II. chap. 12. sect. 22. for extra-parochial townships, and those subdivisions of parishes for which separate overseers are appointed under the same statute. In townships.

The power of making a rate is vested entirely in the churchwardens and overseers, or the major part of them, and the concurrence of the inhabitants is not necessary. (2) By whom made.

(1) See Rex *v.* Audley, 2 Salk. 526. Holt. 576.

(2) Per Holt, C. J. Tawney's case, Salk. 531. 2 Lord Raym. 1013. Per Eyre, J. Rex *v.* St. Michael's, Cornhill, 16 Vin. 425.

But

But as the statute requires that it should be made by the major part of the parish officers, a rate cannot be made by one overseer. (1)

Overseers, how compellable to make it.

If the officers refuse to make a rate, the court of king's bench, where a case is laid before them upon affidavit, will hear both parties, and, if necessary, compel them to do so by mandamus (2); and enforce it by attachment in case of disobedience (3). But they will not intermeddle with the equality of assessment, or interfere even so far as to command them to make an equal rate (4). For the overseers are to take care of that in the first instance, and the court of quarter sessions upon appeal in the second (5). They will grant this writ, however, to compel them to rate a particular description of property if it be altogether omitted. (6)

Allowing the rate.

The act prescribes, that the rate shall be made "with the consent of two or more justices of peace dwel-"ling in or near the same parish, or division where the "parish doth lie, whereof one to be of the quorum." The first step therefore to be taken after making the rate is, to carry it to two justices for their consent, or, as it is usually termed, "their allowance." This allowance is in their individual capacity of magistrates, and not as a court of session, which has no original jurisdiction respecting rates. (7)

(1) Semb. Rex *v.* Atkins, 4 Term. Rep. 12.

(2) Liddleston *v.* Mayor of Exeter, Fol. 18. Rex *v.* Overseers of Weobly, Hull's case, Carth. 14. Rex *v.* Barnstaple, 1 Barnard. 137.

(3) Rex *v.* Edwards and Symonds, 1 Black. Rep. 637.

(4) Rex *v.* Weobly, ut supra. Rex *v.* Overseers of Barnstaple, Fol. 26. and see Butler *v.* Cobbett, 1 Bott, 265. Pl. 258. the case of a mandamus to make an equal assessment of the land-tax.

(5) Ibid.

(6) Post.

(7) Lord Raym. 798.

What-

Whatever might have been the legislature's intention in requiring the consent of the neighbouring justices to a rate it has been often decided that they are to act ministerially, and must allow it as a matter of form, without exercising any discretion to refuse where they think it unjustly and improperly made (1). But if two rates are presented to them by different officers of the same parish, they are said to have an election of signing that which they consider as most equitable. (2)

Justices' power not discretionary.

It seems to follow, from the allowance of a rate's being a ministerial act, that the two magistrates need not meet for the purpose, but may allow it separately. (3)

Though the justices are required by the act to dwell in or near the division, it is not necessary that this should be stated in their allowance of the rate. (4)

But the place for which they allow a rate must be within their jurisdiction. An allowance by county justices of a rate for a whole parish within a borough, having magistrates of its own who possess an exclusive jurisdiction, or for the part of a parish being so situate, is void. (5)

Confined within their jurisdiction.

It is required by 17 G. II. c. 9. that the churchwardens and overseers, or other persons authorised to take care of the poor, shall give public notice of the rate on

Publication.

(1) The case of the Inhabitants of Peterborow, 1 Sid. 377. Rex *v.* Uttoxeter, 1 Const. 76. Rex *v.* Justices of Dorchester, Ib. Pl. 94. 1 Str. 393. Rex *v.* Edwards, 1 Black. 637. Rex *v.* Kynaston, 2 East. 118.

(2) Rex *v.* Anon. Comb. 479. 1 Bott, 99. Pl. 122. It is stated in the report, that the rate which they signed, was made by one churchwarden and overseer; and that they confirmed another made by another churchwarden and overseer.

(3) Per Lord Kenyon, C. J. and Buller, J. Rex *v.* Hamstall Ridware, 3 Term Rep. 380. See also Rex *v.* Forrest, 3 Term Rep. 38. ante, 48.

(4) Cobbet *v.* St. Mary Lincoln, 16 Vin. Abr. 425.

(5) Rex *v.* Folly, 1 Bott, 76. Pl. 96.

the

the Sunday after it has been allowed by the justices, otherwise it is null and void. It must be published therefore in the church, and on the Sunday ensuing the allowance. Where notice was given on the third Sunday after allowance, it was held a radical defect in the rate itself, which nothing could cure (1). But the publication need not be set forth in a special case stated for the opinion of the court of king's bench, respecting the validity of the rate in other particulars. It is sufficient if it aver that the rate was duly made; for the court, with respect to an order of justices, will intend every thing to be right which does not appear to be otherwise. (2)

After a rate has thus been allowed it should not be altered by inserting the names of others, although with the magistrate's approbation. (3)

(1) Rex *v.* Newcombe, 4 Term Rep. 368.

(2) Rex *v.* Aire and Calder Navigation, 2 Term Rep. 660. But this remark does not seem to apply to what is necessary to be set forth to shew their jurisdiction.

(3) See Rex *v.* Barrat, Doug. 449.

CHAPTER IV.

Of the Time for which the Rate is to be made.

THE time for which rates are to be made, is declared in the statute of Elizabeth to be "weekly or *otherwise.*" Upon the discretion evidently given by these words, Lord C. J. Holt was of opinion, that poor rates ought to be made monthly, that being the period at which the same act requires the parish officers to meet in vestry to consider matters for the relief of the poor (1). The same judge was also of opinion, that they were not empowered to make one for a quarter of a year in advance, since a man could not move in the middle of it without being charged twice (2). This inconvenience is remedied by 17 Geo. II. c. 38. which enacts, that persons are to pay the poor's rate only in proportion to the time that they occupy.

Lord Holt's construction of "weekly or otherwise."

Great inconveniences would ensue from making rates for short periods. It is impossible to foresee and provide for every expence that may arise. The Legislature appear to have seen the necessity of extending the rate beyond one week in particular cases, and therefore added the general words "or otherwise," to empower those who make the rate to adapt it to the situation of the parish. The court of king's bench has for these reasons determined, that without any reference to usage in the particular parish, which can have no weight in construing a statute made within time of legal memory, a rate may be

May be for a quarter,

(1) 43 Eliz. c. 2. s. 2.

(2) Tracey *v.* Talbot, Salk. 532. 1 Bott, 77. Pl. 99. Rex *v.* Littleport, 6 Mod. 97. Stevens *v.* Evans, 2 Burr. 1157. But see the opinion of Lord Kenyon, C. J. Rex *v.* Mayor of Gloucester, 5 Term Rep. 346.

made

made prospectively, not only for a quarter of year (1), but for six months (2). Neither do the judges seem to point out in these decisions any definite time short of a year, for which a rate is to be made. They merely lay it down as a principle, that it should not be done wantonly, but on a scale adapted to the probable exigencies of the parish. (3)

or six months.

(1) Rex *v.* Overseers of St. George, Middlesex, 2 Black. 694.

(2) Durrant *v.* Boys, 6 Term Rep. 580.

(3) Ibid.

CHAPTER V.

Of the general Purposes to which the Rate is to be applied.

THE general purposes for which this rate is to be raised, as stated in the act of Elizabeth, are, for setting to work those who are able; relieving such as are not; and for apprenticing the children of parents unable to maintain them; also by 9 Geo. I. for purchasing workhouses(1). 18 G. III. c. 19. enacts, that money shall be taken from this fund to repay constables, &c. what they expend for the relief and removal of paupers and vagrants, which the 13 & 14 Car. II. chap. 12. sect. 18.(2), had directed to be raised by a separate rate. The poor's rate seems applicable to no other purpose, except defraying such law expences as are necessarily incurred by the overseers in the discharge of their office(3), at least when the proceedings are directed by the vestry(4). Thus the salary of an assistant overseer appointed by a vestry meeting cannot be paid out of it(5), nor a sum of money borrowed by the parish to re-build a workhouse.(6)

For what purposes it is to be levied.

Law expences.

For what not.

Where an overseer disburses money out of his private funds to relieve the poor, he may make a rate during his

Not to reimburse former overseers.

(1) 9 G. I. c. 7. s. 4.

(2) Rendered perpetual by 12 Ann. c. 18.

(3) Per Buller, J. Rex *v.* Micklefield, Cald. 507. Rex *v.* Inhabitants of Essex. 4 Term Rep. 591. But see Rex *v.* Chichester, 1 Bott, 410. Pl. 491. Rex *v.* Landillow, Mic. 2 G. 2. cited, Ibid. Rex *v.* Mayor of Gloucester, 5 Term Rep. 346. *Qu.* If the expences and valuation of the property of a parish which has been directed by a majority of the vestry, can be legally defrayed out of it.

(4) Per Willes, J. Rex *v.* Micklefield. Ib.

(5) Rex *v.* Welch and others, Cald. 504. 1 Bott, 318. Pl. 333.

(6) Rex *v.* Wavell, Doug. 116.

con-

continuance in office, and re-imburse himself from the produce(1); or if the rate is unpaid at the expiration of his year, the succeeding overseers are directed by statute(2) "to levy such arrears, and reimburse their predecessors all sums expended for the use of the poor, "and allowed to be due to them in their accounts."(3)

But it was formerly necessary, that the parish officers should in all cases make a rate during their continuance in office, and obtain re-payment of the money advanced out of the produce. For a rate could not be made by new churchwardens and overseers to reimburse their predecessor what he had applied for the poor's support, although he had been turned out of office before the end of his year, and thereby lost the opportunity of making a rate to repay himself(4); nor for law expences incurred by former officers(5). For the act of Elizabeth is express, that they are to raise a fund for the relief of the poor only, and an overseer is not bound to expend money until he receives it(6). So if an overseer continues in office for successive years, he cannot reimburse himself the outlays of former years, by a rate made in the last, although the rates made in antecedent years were either quashed on appeal, or could not be collected as being informal; for all the items of his accounts are to be confined to the particular year for which the act directs they shall be passed.(7)

Con-

(1) Tawney's case, Salk. 531. Rex v. Ware, Fol. 10.

(2) 9 G. I. c. 7. s. 4.

(3) 17 G. II. c. 38. s. 11. Rex v. Overseers of Rotherhithe, 8 Mod. 338.

(4) Tawney's case, ut supra, Ld. Raym. 1011.

(5) Case of the Overseers of Chichester, 1 Bott, 90. n. b. s. 6. Ib. 317. Pl. 330. Case of Overseers of Landillo, Ibid.

(6) Tawney's case, ut supra.

(7) Rex v. Goodcheap, 5 Term Rep. 159. This objection is usually made matter of appeal against the overseers accounts, as being an improper application of the money raised by

Considerable inconvenience occurred in particular cases from this restriction. Unhappily the makers of the statute of Elizabeth did not foresee those enormous burthens which their humanity has thrown upon posterity, and the number of appeals which originate in the hope of escaping from a supposed inequality of taxation. Many things occur to prevent parish officers from making a rate during their continuance in office. When made, an appeal might render it ineffectual, not only against those who dispute the rate, but against such as do not object to the assessments. For overseers were afraid to collect, as they might be harassed with actions to refund money which they received under a void authority. If the rate was quashed at sessions, the office might expire before a new one could be made; and if another was previously allowed, the collection might be again suspended by a fresh appeal. In the mean time the poor must either starve or be supplied by the humanity of those officers, who, if prevented from making a rate for their reimbursement, had nothing to trust to but the uniform honesty of every rateable inhabitant of the parish, to allow, in their accounts, sums of which they had no legal means to enforce payment.

Inconvenience of this rule.

The cases already cited, shew that they could not rely upon this expectation at all times with safety; and par-

by the rate, and not against the rate itself. Rex *v.* Goodcheap, ante. It is only, when the rate appears from the title to be made for this purpose, that it forms a ground of appeal against it. For if the objects of the rate, as set forth in the title, be lawful, the judges will not enter into the question, whether the purposes to which it is actually intended to be applied be lawful or not, although it is stated by the justices in a case for the court's opinion; for that is a subject of appeal against the allowance of the overseers' accounts. See the opinion of Lord Kenyon. Rex *v.* Mayor of Gloucester, 5 Term Rep. 346. But it may come under discussion, as matter connected with making a rate, not only in objection to the title, but upon motion for a mandamus to the parish officers to make a rate for the specific purpose. Tawney's case, ut supra.

ticular circumstances which gave rise to 41 G. III. c. 23. proved, that a system of mischief and oppression might receive effect from a rigorous application of the law, as it then stood.

Remedied by 41 G. III. c. 23. where no rate made, or it is quashed.

To remedy which, section 9. of this act provides, that succeeding churchwardens, overseers, and guardians of the poor shall repay and reimburse those who precede them, such sums as they have advanced or expended for the relief of the poor during the time that no rate or assessment has been made for that purpose; or that any appeal has been depending which affected the whole of such rate, or upon hearing of which the same might be wholly quashed.

In default of payment within 14 days after demand in writing, such preceding churchwardens, &c. or any of them, may apply to the sessions, who shall make an order upon the then churchwardens and overseers to pay them such sum as they shall think fit, which may be levied by distress.

The inconveniencies enumerated seem removed by this provision. The law remains in other cases as it previously stood, in order to compel attention from parish officers in collecting, and enforcing payment of the necessary rates during their continuance in office.

CHAPTER VI.

Of Persons and Property to be rated.

THE 43 Eliz. c. 2. enacts that competent sums to be levied for the purposes therein specified, shall be raised, "by taxation of every inhabitant, parson, vicar and other, "and of every (1) occupier of lands, houses, tithes im- "propriate, propriations of tithes, coal mines, or saleable "underwoods in the said parish, for, &c., to be gathered "out of the same parish according to the ability of the "same parish." 43 Eliz. c. 2. s. 1.

This is the only statutory provision which regulates the description of persons and property to be included in the poor rate. The 13 & 14 Car. II. c. 12. s. 22. extends the operations of the 43 Eliz. to villages and townships, but makes no alteration in the manner of imposing the tax. 13 & 14 C. II. c. 12. s. 22.

By this clause, the assessment is to be made upon the inhabitants and other occupiers of lands, &c. according to the ability of the parish, and the tax is levied upon the person in respect of some particular property possessed or occupied by him (2). All persons who in- Rate to be on the occupiers.

(1) The word "*other*" is inserted here as the statute is recited in Bott. But all the editions of the statutes have it as above. See Rex *v.* Andover, Cowp. 559.

(2) Theed *v.* Starkey, 8 Mod. 314. Sir Anthony Earby's case, 2 Bulst. 354. The poor and church rates are taxes payable in respect of the land, but they are not payable out of the land, for the personal estate only is subject to them. Per Eyre, C. J. Case *v.* Stephens, Fitzg. 297. The statute makes it [the poor rate] personal by subjecting the goods to distress and sale and the body to execution. If a lease be made, and then the lessor quits the parish, the lessee, not the lessor, pays the tax, which goes with the possession and occupation, not with the inheritance. Per Price, J. Ibid.

Who rateable.

habit (1) the district for which the rate is made, being able to contribute (2), and all who occupy real property there, although dwelling elsewhere, come within the act (3). A corporate body is rateable (4), as well as a private individual. But the king is exempt by reason of his prerogative, as not being mentioned in the statute. (5)

Principles of rating property. 1. On real and personal.

Two great principles were laid down by all the judges very soon after the 43 Eliz. was passed, respecting the rateability of property. First, the assessment is to be made according to the visible estate of the inhabitants, both real and personal (6). For the statute renders inhabitants liable to this tax, as well as occupiers of real property, and must therefore affect their personal estate.

(1) " Parishioners is a very large word, taking in, not only inhabitants of the parish, but persons who are occupiers of lands that pay the several rates and duties, though they are not resident, nor do contribute to the ornaments of the church."

" Inhabitants is a still larger word, taking in housekeepers though not rated to the poor, it takes in also persons who are not housekeepers, as for instance, those who have gained a settlement, and by that means become inhabitants. Per Lord Harwicke, C. Attorney-general *v.* Parker, 3 Atk. 577.

" Casual sojourners seem not to be liable, as if a man takes up his lodging in a parish for a week. See Holledge's case respecting a church rate, 2 Roll. Rep. 238."

(2) It is a good defence to a rate that the party is poor and unable to pay. Per Lord Mansfield, Rex *v.* Uffculme, 2 Const. 233. Pl. 262. But his lordship's observation seems to refer to a rate on personal estate. The same judge observes in another report of the same case, that " parish officers are not obliged to rate a man of no abilities; and he cannot oblige them even by 17 G. 2. c. 38. to rate him if he is not fit to be rated. Per Lord Mansfield, C. J. S. C. Burr. S. C. 433.

(3) Jeffrey's case, 5 Co. 66. establishes the principle in the case of a church rate. See the opinion of Lord Kenyon, C. J. Rex *v.* Clapp, 3 Term Rep. 117. post. Rex *v.* Tunstead & Happing. Ib. 523. 1 Const. 626. Pl. 863.

(4) Rex *v.* Corporation of Wickham, 3 Keb. 540. Rex *v.* Gardner, Cowp. 79. Rex *v.* Mayor of London, 4 Term Rep. 21. Per Lord Kenyon Rex *v.* Saltersload Sluice, 4 Term Rep. 730. Rex *v.* Bath Corporation, 14 East, 621.

(5) Semb. Rex *v.* Matthews, Cald. 1.

(6) Sir Anthony Earby's case, 2 Bulst. 354. Rex *v.* Churchwardens of Andover, Cowp. 550. Rex *v.* White, 4 Term Rep. 771.

Second,

Second, No inhabitant is to be taxed to contribute to the relief of the poor, in regard of any estate he hath elsewhere in any other town or place (1). For the statute expressly limits the tax by "the ability of the parish itself," and it would fall with inequality in any other way upon persons of equal substance. Because those who reside or have property in several districts, would be taxed otherwise, not in proportion to their actual ability, but to the number of places in which they lived or had property, acting upon its total value, for they would contribute in each upon the full value of what they possessed in all. (2) All

2. Within the parish.

(1) Ib. In Atkins *v.* Davis, Lord Mansfield says, "By constant usage, "(and I know not upon what other "ground it is) ability to pay is mea- "sured by the local rateable property "in the parish." Cald. 336. But the resolutions in Earby's case are reported 9 C. I. only 33 years after the act passed, and the opinions of this great judge respecting the importance of usage in construing the 43 Eliz. c. 2. seems overruled by subsequent decisions.

(2) The question is very distinctly put in the resolutions of the judges of assize 1633. 18. Qu. "Whether the "law for the relief of the poor upon "the statute of 43 Eliz. shall be made "by ability or occupation of lands, or "both; and whether the visible ability "in the parish where he lives, or gene- "ral ability whatsoever; and whether "his rent received within the parish "shall be accounted visible ability, and "whether he shall be taxed for them "only, and for any rent received from "other parishioners; and what shall "be said visible ability?"

The resolution in answer is not so precise, viz: "The land within each "parish is to be taxed to the charges in "the first place equally and indifferent- "ly, but there may be an addition for "the personal visible ability of the pa- "rishioners within that parish, accord- "ing to good discretion; wherein if "there be any mistaking, the sessions, "&c. or the justices must judge be- "tween them." Dalt. Just. tit. Poor, chap. 73. p. 234. 235. ed. 1727. It is remarked in Dalton, 231., that the authority of these resolutions is not very great. Some country gentlemen coming to Sir Robert Heath when chief justice on the circuit, put him these several queries, to which he subscribed his opinion, then brought the same into Serjeant's Inn Hall, and proposed the same to the rest of the judges; but they differing from him in opinion in many things, they never came to a resolution, and so were no more than his private opinion, which some clerk getting, has published the same, as Justice Twysden declared in the court of King's Bench in East. Term. 28 C. II. as I heard and observed: and afterwards a gentleman of the bar using these resolutions to the third, fourth and eighth questions,

Real property defined.

All estate or property within the parish is divided by these resolutions into real and personal. These terms, when applied to the subject of rating, are not intended to denote the quantity of estate, or to distinguish between a freehold and chattel interest. Such distinctions are immaterial with reference to statutes which, in rating real property, lay the tax upon the occupier according to the actual value of the thing occupied, without regard to the extent or quantity of his interest. (1)

The meaning of *real property* in the poor laws, appears to have been confined in many cases to immoveable things, which are the direct object of sight and touch, and capable of occupation according to strict legal intendment, and to be synonymous to what is comprehended under the term land. More recent decisions seemed to incline towards considering it as extending likewise to all incorporeal rights which issue out of lands and are included under the appellation of a tenement (2), but subsequent determinations have again confined it within its ancient and less extensive signification.

Personal defined.

" By *personal property* is understood stock in trade, " goods, money, and all other moveables, which may " attend the owner's person wherever he thinks proper " to go."

Real property, how

It may not be improper to observe in this place, that when a rate is imposed on real property, it is laid upon

touching putting out apprentices as an authority to his purpose, Justice Twysden said, " why do you use that as an " authority which all the judges disclaimed?" They are however evidence of what the chief justice took the law to be in 1633, and the legislature seems to have had them in contemplation when regulating the poor by statute, in more instances than one. Mr. Caldecott in note (c.) p. 15. of his accurate reports, observes, that it appears from Rex *v.* Fairfax, Carth. 94. Comb. 164. 1 Show. 7. and 3 Mod. 270. 271. that the weight of evidence is in their favour, as having been recognized by all the judges, or at most with a single exception.

(1) Sir Anthony Earby's case, ut supra, 68. and post. 82.

(2) Lord Bute *v.* Grindall, 2 H. Black. 265. and post. sect. 2. p. 82

the

the specific thing taxed, which should be appropriately described in the rate, although techinal accuracy is altogether unnecessary. It is immaterial also whether the occupier of this property reside within the parish or not, for he becomes an inhabitant for the purpose of assessment, by occupying property which is subject to the tax. (1)

described in rate.

Residence immaterial.

But personal property must be rated in a different manner. As it is only the excess of that property which the person has visibly within the parish beyond his debts that is rateable, it admits of no other than a very general description in the rate (2); and although it exists in the parish, it cannot be rated unless the proprietor reside there also. (3)

Personal property, residence material.

In shewing how far and when real property can be assessed, for the poor's relief, it may render the subject more intelligible, briefly to specify those general principles or canons upon which its rateability depends in each particular district.

Requisites to render property rateable.

1ſt, It must not be excepted out of the statute. 2d, It must yield a profit. 3d, It must be occupied. 4th, It must not be rated twice. 5th, It must be situated within the parish or township for which the rate is made.

All these qualifications must concur in order to render the rate upon a particular subject valid, and they seem equally essential to a rate on personal property.

SECT. I.

Of rating Land, Houses, and Profits annexed thereto.

THE first kind of real property mentioned in the statute is "*land and houses.*" They are put by way of example,

(1) See ante, 68.
(2) See instances, post.
(3) Rex *v.* Liverpool. Collinson, East. 43 G. III. 3 Burn's Just. 22d edit. 939. Rex *v.* Jones, Rex *v.* Trin. 47 G. III. 8 East, 451. post.

and not as excluding other kinds of real property of a similar nature; for, not only lands and houses, but shops, sheds, and all things real which render an annual revenue, are subject to the rate. (1)

1. Natural profits of land, &c.

1. Though the tax is laid upon the land or house, it is in respect of the revenue or annual profits which issue from them, and that whether they are produced by nature or by means wholly artificial; for, things very distinct from the natural profits of land are rateable under that name; the land being considered as the principal, the profits of which are augmented by the annexation of the accessary.

2. Natural productions connected with land; as a mineral spring.

2. Thus not only those who have the exclusive enjoyment of land for the purpose of turning on their cattle on it are rateable as the tenants. (2)

But where certain lands and buildings at Cheltenham, containing four acres and a well of mineral water thereout arising, were let at the yearly rent of 100l.; the lands and buildings, independent of the well, being of the value of about 20l. *per annum*. The rent paid for the mineral water of the well was 80l. The tenant was rated upon 100l. *per annum* for the premises, by the description of "lands," and the rate was held to be good. For, it is not a rate upon the profits of the well, but upon four acres of land let at 100l. *per annum*, the value of which arises partly from the buildings, and partly from the spring that produces the mineral water; therefore the profits of the spring are part of the produce of the land,

(1) 4 Com. Dig. tit. Justices of the Peace. B. 66. p. 565. 4th edit. The resolution of the judges of assize in 1633, accords with this opinion. It being taken perhaps from the 19 Qu. Whether shops, salt-pits, sheds, profits of a market, be taxable to the poor, as well as lands, coal-mines, &c. expressed in the statute? Resol. "All things "which are real, and in yearly revenue, must be taxed to the poor." Dalt. 235. Indeed, the term land, in its strict legal signification, comprehends all these denominations of real property: for, "it includes, not only the face of the earth, but every thing under it or over it." 2 Black. Com. book 2. chap. 2. p. 18.

(2) Rex *v.* James Watson, 5 East, 480.

and as such ought to be rated (1). In Worcestershire and Cheshire, where there are salt springs, the rent of the land is increased considerably on that account. (2)

3. By 17 Geo. III. c. 18. passed for more effectually completing the navigation of the river Thames, the city of London purchased an ancient barge-way or towing-path, with certain ancient tolls thereto belonging, situate within the hamlet of Hampton Wick, which maintains its own poor. In pursuance of the act they discontinued the old tolls and collected new ones, authorised by the statute, and let the annual herbage and pasture of the barge-way at a yearly rent, the tenant of which was rated for the same. It was held that the corporation was assessable to the poor rates of the hamlet, for such tolls as became due there; for, the rate is made upon "the barge-way and the toll gate," and the corporation have the inheritance and ownership of the soil, which is the subject matter of the rate; and being occupiers, notwithstanding the demise of the herbage, they are liable to be rated. (3) 3. Artificial profits of land; as of a towing-path.

4. So land purchased by a company, and converted into a dock by statute, which declares that the shares of the proprietors shall be considered as personal property, are rateable for the amount of the annual profits, under the appellation of a dock, although personal property is not rated in the parish; for, it is landed property lying there, and was liable as such before the act passed; the legislature in declaring the shares personal property, did not mean to exempt this land which was rateable and rated before, but only to declare that it should go to executors instead of heirs. (5) 4. Of a dock.

5. Also the lessee in possession "of a fishery of the "Halves and Halvendales with the fishings called Un- Several fishery.

(1) Rex *v*, Miller, Cowp. 619. Per Lord Mansfield, C. J. Atkins *v.* Davis, Cald. 338.

(2) Per Lord Mansfield. Rex *v.* Miller, ut supra. Resolution of Judges, 1633. ut supra, n. 1. p. 72.

(3) Rex *v.* Mayor of London, 4 Term Rep. 21.

(1) Rex *v.* Dock Company of Hull, 1 Term Rep. 219.

"lawater,

" lawater, with the appurtenances to the Halves due " and accustomed within the river Severn," is rateable for them as occupier of so much lands, covered with water over which the fishery is enjoyed. (1)

Lock and tunnel of a canal, &c.

6. Upon the same principle the lock and tunnel of a canal is rateable for the dues and rates which become due there, inasmuch as they constitute its profit (2). So likewise profits accruing in the parish from a reservoir for collecting water, for the purpose of supplying a city with water, may be included in an assessment upon " the reservoirs and water kept therein;" for they being comprehended within the legal description of land are clearly rateable. (3)

Lot & cope.

7. Further likewise, a direct interest or profit arising from a right to take part of the soil or its produce, is rateable when the land is not liable to assessment in other respects. Such are the lot and cope of a lead mine (4) and the toll and tin dues of a tin mine (5); lots, toll, and free share of calamine to be raised within a manor (6); and if a man has taken a lease of land with privilege to dig for mines, he may be rated for the land. (7)

(1) Rex *v.* Ellis, Trin. 53 G. III. Maule & Selw. MSS.

(2) Rex *v.* Sir Archibald Macdonald, 12 East, 334. See this case at length, post. 119. Under this head, according to recent decisions, all cases of assessment on tolls where the proprietor does not reside in the parish, should more properly be classed; but the author has postponed a more full statement of these cases, to the subsequent section, as it appears to him that the general subject will thereby be explained more clearly. These cases are Rex *v.* Page, 4 Term Rep. 543. Aire & Calder Navigation, 2 Term Rep. 660. Rex *v.* Proprietors of Staffordshire Navigation, 8 Term Rep. 340. Rex *v.* Salterload Sluice, 4 Term Rep. 730. Rex *v.* Sculcoates, 12 East, 40.

(3) Rex. *v.* Corporation of Bath, 14 East, 609. Rex *v.* Rochdale Company, Trin. 53 G. III. Maule & Selw. MSS.

(4) Post 83.; and see the observation *n.* (1.) Rowls *v.* Gells, Cowp. 451. post. 83.

(5) Rex. *v.* St. Agnes, 3 Term Rep. 480. post.

(6) Rex *v.* Baptist Mill Company, East. 54 G. III. post. Maule & Selw. MSS.

(7) Per Lord Mansfield, Smelting Company *v.* Richardson, 3 Burr. 1341. 1 Black. Rep. 349.

Way-leave.

8. So the occupier of land, over which a way-leave or way-leave waggon-way is erected, for the purpose of carrying coals from his mine, is rateable for the value of the waggon-way. (1)

Incorporeal hereditaments annexed to land there.

9. Incorporeal hereditaments have been deemed rateable as an adjunct profit when annexed to lands and houses, although not issuing from thence. Thus an estate may be rateable in a higher proportion, on account of a right of common being appendant to it, (2) and, as it is said, although the common land itself is situate in another parish. (3)

Personal chattels annexed to it; a machine affixed to the building.

10. In the same manner a real subject has been held rateable according to its annual value, although that value be derived from the annexation of a personal chattel. As where a corporation, being possessed of a house, erected a machine in the street leading by the said house, for the purpose of weighing waggons, carts, &c. loaded with coal, &c. at 2d. a ton, the steelyard part of the said weighing machine was, and always had been, in the said house. The corporation was rated for the *machine house*, according to the annual value not only of the house itself, but of the clear profits of the machine. The rate is good, for they are one entire thing, and the house is rendered much more valuable from the machine's being appurtenant thereto. (4)

Some reliance seemed to have been placed by the court in this case upon the machine being affixed, and as such constituting part of the freehold.

Personal chattels le

But where a building, called the engine-house, consisted of a bay of building 18 feet long and 19 wide, in

(1) Rex *v.* Bell, 7 Term Rep. 598.
(2) Per De Grey, C. J. Kemp. *v.* Spence, 2 Black. 1245.
(3) Eod. Jud. Ibid. But the learned judge only states that "possibly" the law may be so.
(4) Rex *v.* St. Nicholas Gloucester, Cald. 262.

which

with it, though not fixed. A carding machine.

which there was a carding machine for manufacturing cotton, not fixed to the premises, but capable of being moved at pleasure. The building, independent of the machine, was worth only two guineas *per annum*. The building and machine together were rated at 36l. It was not the usage of the place to rate personal property (1). The engine is generally worked with water, but frequently by the hand. The building was not a dwelling house, nor erected for the purpose of receiving the engine. There was in the same building another carding and a tumming machine (2). All the engines were placed on the floor, and no ways annexed or fastened to the same, but might be moved at pleasure, and carried out and worked in any other place, either by means of water or manual labour, and were not adapted to any particular building. The frame in which the engine stood was 12 feet long, 3 feet 11 inches broad, 2 feet 9 inches high; the semi-diameter of the largest cylinders, with a small roller at the top, rising 20 inches above the frame; the engine sinking in the frame 17 inches. One L. W. was lessee of the premises under the owners, and subject by his lease to discharge the premises from taxes; the appellant was the under-tenant, but L. W. paid the taxes.

The court were of opinion, that though it did not clearly appear whether the carding-machine was actually

(1) This was the substance of the case as originally stated by the court of quarter sessions. But the court of king's bench sent it back to be re-stated, requiring them to return answers to the following inquiries? "Whether the engine mentioned in "the said order is worked with water "or with horses? and whether the "house wherein the said engine stands "is a dwelling-house, or built for the "purpose of receiving the engine? "and in what manner the engine is "put up in the engine-house, and "what is its size and bulk? and also, "whether the owner of the building "has contracted to discharge the oc-"cupier of all the taxes?" The remainder of the above case is the return to this order. Cald. 266.

(2) These were not rated; nor, so far as can be conjectured from the case, demised with the building.

fixed

fixed to the building or not (1), yet being demised with it, and forming one entire subject, and the rate being on the building, it was properly rated for the entire profits, the house acquiring a greater value from the use to which it was put, and that it fell exactly within the case of Rex *v.* St. Nicholas, Gloucester. (2)

Two of the judges were also of opinion, that the engine was rateable as personal property, and that the finding by the justices "that it was not usual to rate personal "property in the place," made no difference upon that question.

The remaining judge said, it was enough to enable the court to confirm the rate, that part was rateable, viz. the house, and the rate being on the house, the court would not interfere with the quantum of the rate. (3)

Machinery of a malt-house.

So a tenement of little or no value, fitted up as a malt-house, and a malt-mill put into it, then the whole is let together; the whole must be estimated together as any other leasehold property, according to its value. (4)

A billiard-table.

It is also laid down by another judge, that "if a billiard-table stand in a house, and the house should in re-

(1) "It seems to me that this "case is still imperfect; for it is not "stated negatively, that this engine, "while it is in a state of working, is "not some way or other fixed to the "house. It is only stated that it is "not fixed to the floor. But it may "be fixed to the walls of the building "without being fixed to the floor. "We can assume no facts on either "side; but one should suppose that "it must be fastened in some way, "otherwise, as it is worked by water, "the weight of the water must "displace it." Ashhurst, J. Cald. 273.

(2) Rex *v.* Hogg, Cald, 266. 1 Term Rep. 721.

(3) Ibid. But in Rex *v.* the Leeds and Liverpool Canal Company, where a rate was made upon the tolls of a canal, part of which were rateable, and part exempt by statute, the court quashed the rate, it being the business of those who made it to apportion it. 5 East, 325.

(4) Per Grose, J. Ibid. According to the report in Caldecot, the learned judge supposes this mill to be removable at pleasure. Cald. 275.

spect

spect of such table let at a higher sum, it is rateable while the table continues there, and it is so let at the advanced rent." (1)

SECT. II.

Incorporeal Hereditaments per se. (2) *and herein of rating Rents, Tolls, and other Profits.*

Doubts as to incorporeal hereditaments being rateable per se.

PROPERTY, such as is described in the preceding section, is rateable to the poor by reason of its local existence within the district for which the rate is made, without regard to the occupier's residence within the limits. But incorporeal hereditaments seem to stand in a different situation. That most of these profits are rateable when the right or thing from which they accrue is annexed to lands or houses, appears fully settled by the foregoing cases (3); but whether an incorporeal right yielding an annual profit, is rateable in the hands of one who does not reside within the district for which the rate is made, and who has no possession of the soil out of which such profit arises, and to which it can be consi-

(1) Per Willes, J. arguendo. Rex *v.* St. Nicholas, Gloucester, ut supra. If this case proceeds on the supposition that the billiard-table need not be affixed to the floor; or if Rex *v.* Hogg goes the length of establishing, that things let together with a house in the same demise, and yielding a profit, are rateable whether fixtures or not; a house leased out ready furnished, or a farm demised ready stocked, seem rateable for the intire conjunct value. But furniture is not rateable as personal property. Rex *v.* White, 4 Term Rep. 771. Nor the stock necessary for the culture of a farm. Queen *v.* Barking, 2 Ld. Raym. 1280. 16 Vin. Abr. 426. See post. No question was raised in these cases as to the owner's residence.

(2) They might perhaps with more strict propriety be called incorporeal tenements. "Tenement, in its original, proper, and legal sense, signifies every thing that may be *holden*, provided it be of a permanent nature; whether it be of a substantial and sensible or of an unsubstantial ideal kind. Thus liberum tenementum, frank-tenement or freehold, is applicable not only to lands and other solid objects but also to offices, rents, commons, and the like, Co. Lit. 6. And as lands and houses are tenements, so is an advowson a tenement: and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are all of them, legally speaking, tenements." Co. Lit. 19, 20." 2 Black Com. book 2. chap. 17.

(3) See also Rex *v.* J. Nicholson, 12 East, 330., and other cases cited, post.

dered

dered as annexed, has formerly created considerable doubt among the judges.

As incapable of occupancy.

The act speaking of rating real property, as distinguished from rating an inhabitant, directs the assessments to be laid on the occupier, and the doubt was whether this kind of property lies in occupancy. It was contended, that it did not, according to the common law sense of the word, since actual possession could not be delivered. No ejectment would lie to recover the thing itself, nor could trespass be brought against those who infringed the right. (1)

It was said therefore, that a right of common cannot be rated, as not being the subject of occupation (2). It was doubted among the judges for the same reason, whether the privilege of taking herbage and pannage is rateable (3). The annual profits of a fair have been incidentally held not to be so (4): and according to one report it seemed intimated by the judges, that the tolls of a light-house were not rateable, only because the light-house was not made the subject of the rate (5). In a recent case also it was held, that a mere easement in the soil of another, such as a right of passage for which a certain annual rent is payable, is not rateable. Therefore, where a person is possessed of a waggon-way, and another agrees with him for the use of it for carrying his coals at so much *per* ton, the latter at least is not liable

(1) Jones *v.* Maunsell, Doug. 302. See the opinion of Lawrence, J. Rex *v.* Watson, 5 East, 485. of Lord Ellenborough, C. J. Rex *v.* Bishop of Rochester, 12 East, 353.

(2) Per De Grey, C. J. Kemp *v.* Spence, 2 Black. 1245. and Rex *v.* Watson, ante, (1).

(3) Jones *v.* Maunsell, Dougl. 302. See Rex *v.* Minchin Hampton, 3 Burr. 1310. Lord Bute *v.* Grindall, 1 Term Rep. 338. 1 H. Black. 207.

(4) Rex *v.* Brograve, 4 Burr. 2291.

(5) Rex *v.* Rebowe, Dougl. 118. n. where it is expressly stated that the court observed that it was not set forth in the case that Rebowe was rated for the house, but only for the tolls.

to

to be assessed (1). It has been doubted likewise whether a person who has a mere permission to turn his cattle on another's land is rateable as an occupier. (2)

Contrary opinion.

But the general principle upon which these cases are said to depend, was doubted by those judges who leaned to the other side of the question; and it was observed that property has been considered as capable of being *occupied* within the meaning of the statute of Eliz. although it is not so according to the strict common law sense of the word.

Sir Robert Heath, C.J. was of opinion so early as 1633, that the profits of a market might be taxed to the poor. (3)

1. Tolls.

In 27th Car. II. the tolls of a corporation were held rateable; but it does not appear from the reports, what the nature of these tolls were, or for what they were paid (4). In more recent cases, the profits arising from tolls paid for passing a particular sluice (5), or bridge, being private property (6), and also those from tolls payable for carriage of goods on navigable canals, have been adjudged liable to this assessment. (7)

When not rateable.

Turnpike and other tolls paid for the public benefit, and not of private individuals, are not subject to this tax;

(1) Rex *v.* Joliffe, 2 Term Rep. 90. Per Lord Kenyon, C. J. Rex *v.* Bell. 7 Term Rep. 600.

(2) Per Lord Ellenborough, C. J. Rex *v.* Aberavon, 5 East, 453. and Rex *v.* Watson, 5 East, 480.

(3) Ante, 72. n. (1).

(4) Rex *v.* Corporation of Wickham, 3 Keb. 540. Freem. 419. 16 Vin. Abr. 425. Ashhurst, J. supposed it might be for piccage, which is, in nature of a rent for land, for it is an acknowledgment payable to the owner of the land in respect of the use made of the soil; i. e. breaking the ground for the erection of booths and stalls in a fair or market. Atkins *v.* Davis, Cald. 382. But Willes and Buller, J. held it to be good law as a common case of toll. Ib. 328. Ib. 333.

(5) Rex *v.* Cardington, Cowp. 58. 1 Bott, 152. Pl. 177. But Ashhurst, J. denied this case to be law. Atkins *v.* Davis, Cald. 332.

(6) Jones *v.* Maunsel, Doug. 302. n.

(7) Rex *v.* Page, 4 Term Rep. 543. Rex *v.* Aire and Calder Navigation, 2 Term Rep. 660. Rex *v.* Proprietors of Staffordshire Navigation, 8 Term Rep. 340. and see Rex *v.* Mayor of London, 4 Term Rep. 21.

but

but this might be accounted for, upon the principle that there is no beneficial occupier. (1)

Doubts.

It has been urged, however, that these instances are not decisively in point to impugn the principle relied on. That in those of tolls of a sluice or bridge, the persons rated might have some property in the soil on which they stood (2); and in the case of navigable canals, the land is always purchased by the proprietors of the canal, so that it resembles lands converted into a dock, which are held rateable for the profits. (3)

Casual profits.

The casual profits issuing from the realty, seem not to be rateable, at least under the general circumstances attending this species of property.

Thus the Lord of the Manor is not rateable for the manor itself (exclusive of the demesne lands) consisting of quit-rents, fines for the removal of copyholds and other casual fruits and profits, he occupying nothing else in the parish (4). On a question whether the herbage and pannage of Rockingham forest was rateable, the court were devided in opinion. (5)

Incorporeal fisheries.

A mere incorporeal fishery is not within the statute of Eliz. for the party to be rateable, if non-resident, must be an occupier of land. (6)

(1) Per Lawrence, J. Rex *v.* Staffordshire Navigation, Ib. & post. 87.

(2) See Rex *v.* Sir A. Macdonald, 12 East, 334. post. 119. But see the opinion of Buller, J. Atkins *v.* Davis, Cald. 326. that in Rex *v.* Cardington, Mr. Palmer, who was rated for the tolls, had no property either in the soil or water, nor any thing but a power of erecting sluices and taking tolls.

(3) Ante, 73. Per Lord Ellenborough, C. J. Rex *v.* J. Nicholson, 12 East, 330. In Rex *v.* The Proprietors of the Staffordshire Canal, it was tken for granted that the rate was not upon the land, but upon the tolls. See the opinion of Le Blanc, J. ante, 80. (7) post, 112.

(4) Rex *v.* Vandewall, 2 Burr. 991. See also Carth. 14.

(5) Jones *v.* Maunsell, Dougl. 302. The court granted a new trial that the point might be settled in a special verdict. But it seems not to have been stirred again. See the opinion of Lord Mansfield, C. J. Lord Bute *v.* Grindall, 1 Term Rep. 338.

(6) Per Bayley J. Rex. *v.* Ellis, Trin. 53 G. 3. Maule and Selw. MSS.

The most usual species of incorporeal hereditaments upon which questions of rateability have arisen, are 1. Rents, 2. Tolls.

Rents why not usually rateable.

1. Rents could not be usually rateable *eo nomine*, for they are commonly rated in the land (1), and if the landlord should pay on his rent, and the occupier in respect of his possession, the premises would in effect be rated twice. But ground rents have been held rateable. (2)

2. Ground rents.

3. Quit rents.

Quits rents, and the casual profits of a manor, have been held not rateable (3); but this decision is maintainable as to quit rents, upon the principle of excluding a double rate, and the reason assigned by Lord Kenyon, C. J. why a profit in the nature of rent could not have been rated, was because that would be to rate the subject matter twice (4). Lord Mansfield appears to have been of the same opinion, and Mr. Justice Blackstone seems to have doubted likewise whether some rents were not assessable to the poor (5). Lord Holt declared, that quit rents were determined to be rateable. (6)

(1) Per Eyre, C. J. Lord Bute *v.* Grindall, 1 Term Rep. 338. 2 H. Black. 265. Sir Anthony Earby's case, 2 Bulst. 354.

(2) Rex *v.* Gibbs, Comb. 62. 1 Bott, 115. Pl. 147. But quere whether such an assessment would not in most cases be as bad as a double rate?

(3) Rex *v.* Vandewall, 2 Burr. 991. This decision seems to have turned upon the ground of usage, as never having been rated before. For usage was considered by Lord Mansfield, as a cotemporaneous, or rather consuetudinary exposition of the statute, and relied upon as a rule of decision, in this and other cases. But besides that, the determination referred to by Lord Holt precluded the presumption of general usage: it is now settled, that usage cannot be resorted to, in order to limit the express meaning of this modern statute. See the opinion of Buller, J. Atkins *v.* Davis, Cald. 326. post. 93. In Rowlls *v.* Gells, Lord Mansfield seems to consider the reason why the casual profits of a manor are not rateable, to be that they are not annual, for there may be none for years. Cowp. 451.

(4) Per Lord Kenyon, C. J. Rex *v.* Alberbury, 1 East. 535. Et per Eyre, J. Comb. 264.

(5) Lowndes *v.* Horne, 2 Black. Rep. 1252.

(6) Per Holt, C. J. Comb. 264. See Hull's case, Carth. 14. Eyre, J. contra.

Where

4. Lot and cope of a mine.

Where profits issue immediately out of land, and arise from the ownership thereof, and form as it were part of the soil or produce, it seems still to be considered as law, that the possessor is rateable, unless it had been previously assessed in another shape. Thus where the crown demised for years at a yearly rent, all those mines of lead with their appurtenances, within the soke and wapentake of W. with lot and cope; the first of which is a duty of every 13th measure of lead ore dressed and made merchantable; and the latter a duty of 6d. for every load, or nine dishes of lead ore raised at all mines within the said soke, &c.; both being received by the lessee without any risk or expence of working the mines, he is rateable for the lot and cope according to their annual value, and as that varies; for it is part of the owner's visible real property in the parish; not a casual profit, but an annual revenue, and the immediate lessee of the lead mine not being rateable, it is not twice rated. (1)

So

(1) Rowls *v.* Gells, Cowp. 451. and see the opinion of Buller, J. Rex. *v.* Carlyon, 3 Term Rep. 385. The report of Lord Mansfield's judgment is "The poor's rate is not a tax upon "the land, but a personal charge in "respect of the land. The present "is a personal charge by reason of "the annual profits which the les- "see of the crown receives out of "the land, and which is not charged "at all before to the poor. In gene- "ral the farmer or occupier of land, "and not the landlord, is liable to "this tax; for it arises by reason of "the land in the parish; and the "landlord is never assessed for his "rent, because that would be a dou- "ble assessment, as his lessee has "paid before. Lead mines are not "within the statute 43 Eliz. c. 2. "They are in themselves uncertain, "and may prove unsuccessful to the "adventurer. Taxes therefore upon "the adventurers would be hard, "and they are excused. But the "person, lord, or landlord, who, in "case they do prove of value, re- "ceives a stipulated benefit from "the profits or value of them, is not "excuseable upon the same ground, "and therefore is expressly charged "to the land tax as that falls upon "the landlord. He is alike liable "to the poor's rate for his visible "real property in the parish, though "when the poor's rate is a charge on "the lessee, the landlord does not "pay in respect of his rent. When "the adventurer as lessee of "the mine pays nothing, it is no "double tax in any light, because "the lord pays not for that which "the lessee or adventurer is excused "from

5. Farm tin.

So the proprietor of a certain dish or measure arising out of certain lands and tin bounds in the parish, called toll and farm tin, which toll is one fifteenth part of all the tin gotten, and the farm tin is one twelfth part after the said fifteenth is deducted for toll of all tin gotten within the tin bounds in the parish, which dues are payable by the laws and customs of the stannaries of Cornwall, and is paid free and clear of all risk and deductions, was upon the same principles adjudged rateable for all annual profits, although the amount of the toll varies, and is uncertain (1). These cases have been considered in the nature of rents paid to the owners (2), and to depend upon the same principle; for whether it is a return in kind, or money, was supposed to make no distinction; and that it made as little, whether a reversion was annexed to the rent or not.

But the more recent determinations seem to place

" from paying for, but the lord pays " for his own. It is not mere casual " profit, but an annual revenue if " any, and very different from the " casual profits of a manor which " are not annual, for there may be " none for years. But if the mine " produce profit to the miner, the " lord's share is certain, annual, AND " AN ANNUAL RENT IS PAID FOR " IT CONSTANTLY. The miner is " obliged to pay certain proportions " to the owner of the lands; what " reason then is there to exempt " these proportionable revenues? It " makes no difference to the adven- " turer, it does not prejudice nor be- " nefit him: *But as such obligatory* " *payment is in respect of the lands,* " the land owner ought not to re- " ceive it clearer or neater than any " other part of his estate, when he " is at no trouble, expence, or pos- " sible risk; therefore we are all of " opinion that the plaintiff is liable " to be rated for the property." In this case, part of the property rated was a monied duty of 6d. per load of lead ore raised from the mine, and it did not appear whether the lessee resided within the parish; but it is manifest that Lord Mansfield treats it as visible, real property, for which the landlord was assessable wherever he resided. Lord Kenyon is supposed to have doubted this case in Rex *v.* Parrot, 5 Term Rep. 593. But he relied upon and approved of it in Rex *v.* St. Agnes, 3 Term Rep. 480. It was likewise relied upon by Buller, J. Rex *v.* Carlyon, 3 Term Rep. 385., and at least to a certain extent by Lord Ellenborough, C. J. Rex *v.* Bishop of Rochester, 12 East, 353. post. 85. And by the court in Rex *v.* Baptist Mill Company, post. 86.

(1) Rex *v.* St. Agnes, 3 Term Rep. 480.

(2) Per Lord Mansfield, Atkins *v.* Davis, Cald. 337.

their

their rateability upon the principle that the persons rated, though not occupiers of the entire land, were to be considered as in possession thereof to a certain extent, as being qualified occupiers of particular profits arising immediately therefrom, and as such rateable (1); or to state the general position as laid down by Eyre, chief justice, whose judgment is delivered as the opinion of all the judges in the exchequer chamber:—"We think "it may be stated as a general proposition, that the "immediate profits of lands (some mines excepted) are "the proper subject of assessment; or to speak more "correctly, that the person who is in possession of the "immediate profits of land, may be taxed to the relief "of the poor in respect of these profits. (2)

General principle.

Upon a question whether the lot, toll, and free share of calamine was rateable, it was stated that by indenture reciting that J. L., as lord of the manor of Rowberrow, was entitled to a lot, toll, or free share of all calamine or lapis calaminaris raised within the manor, in the proportion of one part in four, and which had been lately received by him at only three parts in twenty in the enclosed lands, but were not yet ascertained in the unenclosed lands; the Baptist Mill company had agreed to take to the said lot or free share of the said J. L.: the said J. L. demised to the company "all that the "said part, purpart, lot, and free share of the said J. L. "as lord of the manor, of and in all calamine stone or "lapis calaminaris raised or gotten, or to be raised or "gotten in the enclosed lands, or the waters, or the

Non-resident lessees of lot, toll, &c. of calamine, rateable.

(1) Per Eyre, C.J. Lord Bute *v.* Grindall, ut supra, 80. (1)

(2) Eod. Jud. Ibid. The answer to 18 qu. in the resolutions of the judges of assize, 1633, seems to take it for granted, that rents are rateable as part of the visible ability: but it does not directly decide the point. In Halford *v.* Copeland, 3 Bos. & Pull. 143., when the question arose upon a paving rate, Lord Alvanley observed that if a house be hired for transacting the business of the secretary of state, though the house be not rateable as a private house, the owner remains liable. See also the opinion of Lord Kenyon, C.J. Eckersall *v.* Briggs, 4 Term Rep. 6.

"other lands within the said manor, or which he had "a right to claim or demand, with liberty to take and "carry away the same;" to hold to the lessees, their executors, &c. for 10 years, at the yearly rent of 210l. The case further stated that the lessees were not, at the time of making the rate, in the occupation of any land or building in the parish of R. unless the lot, toll, and free share is to be considered as land; that they and their agent for collecting this free share reside elsewhere, and run no risk, nor incur any expense whatever. The court were of opinion that as this share was received without risk or contingency, it could not be considered as a mine exempted from taxation by the statute; and that the lord being entitled to a share of the original produce of the soil he was a qualified occupier of the land itself, and would have been rateable as such, if his interest had not been demised; and as this was not a lease of a personal chattel, but of a share of the produce of the land before the mineral was actually raised, the lessee was as an occupier of this land to that extent, and rateable as such for the profits of the free share. (1)

Lessor of lead mines not rateable for rent.

But on the other hand where a landlord having leased lead mines and other minerals, with liberty to the tenants to dig and search for pits under the land, reserving a certain annual rent, and also certain proportions of the ore which should be raised, he was held not assessable for the rent where no ore is raised, and he did not reside in the parish, for it is a rate upon the rent of land occupied by another. (2)

The

(1) Rex *v.* Baptist Mili Company, Trin. 53 Geo. 3., Maule and Selw. MSS.

Lessors of lead mines not rateable for rent as occupiers.

(2) The King *v.* The Bishop of Rochester and others, Trustees under the will of the late Lord Crewe, 12 East, 353.

The trustees appealed to the sessions against a poor rate made for the parish of Hunstonworth, in the county of Durham, in which they being lessors in the lease after mentioned, were rated in the sum of 50l. being one moiety of the certain rent of 100l. reserved by the said lease. The sessions confirmed the rate, subject to the opinion of this court on a case, which set forth the lease under which the rent was reserved. This was an indenture of lease, dated

The case of tolls has given rise to further discussion, and Tolls.

ted the 30th of May, 1805, and made between the Bishop of Rochester and the other trustees appointed by the will of the late Lord Crewe, of the one part, and A. Surtees and others of the other part, whereby the trustees demised to the lessees "all the mines, veins, &c. "parcels, and wastes of lead ore and "minerals and fossils, and also all the "seams of coal then open or discov-"ered, or which should or might du-"ring the time therein mentioned "be opened or discovered, within, "under, or upon the township lands "called Muckton, in the parish of "Hunstonworth, and within certain "other lands therein mentioned, to-"gether with full liberty and autho-"rity for the lessees to dig and "search for pits, &c. under any of "the said lands, for getting all "the lead ore, minerals, and coals, "in or upon the said mining "grounds," with other powers for the erection of machinery and other buildings on the mining grounds, and for facilitating the working of the mines as therein mentioned: "to hold the demised premises to "the lessees for the term of 21 years, "yielding and paying therefore, year-"ly during the said term, unto the "said lessees, their heirs, &c. for and "in respect of the said lead ore and "other minerals, the clear yearly rent "or sum of 100l." payable half-yearly. There was also reserved, by way of rent, certain proportions of such lead ore as should be gotten from and out of the said mining grounds. There was also a separate rent reserved for the coals, when wrought, and a rent for damage done to the ground tenants. The lessees were bound to pay all manner of taxes, rates, assessments, and impositions whatsoever, parliamentary or parochial, already or thereafter to be taxed on the demised premises, or on the lead ore, or other minerals, coals, or fossils gotten thereout, or on the lessors or lessees in respect thereof. The case also stated, that no coal mines had been wrought within the grounds mentioned in the lease. That the lessees had other lead mines in the neighbourhood, but had gotten no ore from under the grounds of the lessors mentioned in the lease, and consequently no proportion of lead ore had been rendered or become due to the lessors. The lessors stood rated in 50l. being a moiety of the certain rent of 100l. reserved by the lease, and which was deemed a fair proportion for that part of the mining ground which is in the parish of Hunstonworth, and the lessors, if liable at all, did not object to the fairness of the apportionment. They stand rated in the following form: "Lord Crewe's trustees for certain annual rent paid them by Easterby, Hall, and Co. for the liberty of opening the mines within their lands, spoil of ground, &c. 50l.—Rate 8l. 15s." None of the lessors reside or have any dwelling house in the parish of Hunstonworth. The lessees were not rated to relief of the poor in respect of the demised mines.

Nolan and Littledale, in support of the rate, relied principally upon the authority of Rowls *v.* Gell, where the owner (lessee under the crown) of lead mines was rateable

and to a greater number of determinations; and it seems now

to the poor for the profits of lot and cope, which were certain duties paid to him by the adventurers, without any risk incurred by himself in the adventure: though they admitted the pressure of the recent decision of the court in Williams *v.* Jones. Before that decision they said that they were prepared to contend that the words "lands, houses, &c." in the stat. 43 Eliz c. 2. the occupiers of which were made rateable to the relief of the poor, were only mentioned in the statute by way of example, and that the legislature meant to subject to the same taxation every species of real property. By the resolutions of the judges of assize in 1633, to the question whether shops, salt-pits, profits of a market, &c. be taxable to the poor as well as lands coal mines, &c. expressed in the statute; the answer is, "all things "which are real and a yearly reve- "nue must be taxed to the poor." In the King *v.* St. Agnes, the person entitled to toll tin and farm-due, being certain proportions of the tin raised by the adventurers, was held rateable for such proportions received by him. It cannot vary the case that this payment is reserved to the lessors by the name of a rent. Rents are only held not taxable where the whole profit of the land is in the first instance taxable in the hands of the tenants or actual occupiers; in which case it would be twice taxed, if the landlord were again taxed for his rent: but the ground of the former decisions was, that the adventurers were not taxable for their profits, which were precarious, and therefore the lord or owner, who run no risk, was taxable for what he received in respect of his real profit; but the landlord or owner has always been considered taxable for any profit of the land received immediately by him, for which the tenant or actual occupier was not assessable. This principle appears to be recognised by Lord C. J. Eyre in delivering the judgment of the exchequer-chamber in Lord Bute *v.* Grindall, and by the courts of K. B. and C. P. in Eckersall *v.* Briggs, Atkins *v.* Davis, and Holford *v.* Copeland. In all these cases it seems to be taken for granted that rents and other annual profits of land are rateable, unless where the tenant is assessable for the whole annual value of such land in his occupation; and in none of these cases is any notice taken of the residence of the proprietor in the parish in which the property lies. Occupier in the statute of Eliz. was meant to be used in the popular sense, as possessor, that is, of real property: and inhabitant has always been considered as extending to include the owners of every species of property in the place, whether lying in grant or in livery. The great distinction as to residence lies between real and personal property where the owner is rated for his ability generally; which must of course be in the place where he resides; for there only can it be visible; but all local visible property, yielding annual profit, is rateable in its nature; and real property can only be rated in the place where it is situate, and where alone it is visible and produces profit.

Lord

now settled by frequent decisions, that though tolls are a species

Lord Ellenborough, C. J. What is there in this case, which is to be the subject matter of rating, but a contract, by which the landlords get a certain profit for granting to others a liberty of mining, when perhaps the tenants may never be able to make any profit at all from the land, which may be wholly unproductive? Bayley, J. In Rowls *v.* Gell, and the King *v.* St. Agnes, the property for which the lords were rated was not demised. Le Blanc, J. The argument goes the length of contending for the rateability of all rents in the hands of landlords.] It does so where the subject-matter is not rateable in the hands of the tenants.

Dampier, Raine, and Hullock, contrà. The demise is of all mines, &c. within a certain district, with a licence to dig for ore, &c. and a money rent is reserved in respect of that licence, but nothing has yet been produced by the land, which land is rateable, if at all, in the hands of the tenants for its annual produce, so far as the subject matter produced is in itself liable to be assessed within the construction of the stat. 43 Eliz. But this is an attempt to rate a money-rent in the hands of the landlords, none of whom reside in the parish, and who not being rateable as inhabitants, can only be rated, if at all, as actual occupiers of land within the parish. It must therefore be shewn that the receipt of rents elsewhere is an actual occupation of the land in respect of which such rent is reserved; which must go the whole length of establishing that landlords are liable to be rated, as well as tenants; and this, even though the land produce no annual profit at all in the hands of the tenant. If this were so a landlord would by the same rule be rateable for the profits of his timber. It has been long settled that no other mines than coal mines, which are expressly mentioned in the statute, are rateable at all; but by the construction now contended for, they would be made rateable in the shape of rent in the hands of the landlords by whom they were leased out. The decision in Rowls *v.* Gell, on which the King *v.* St. Agnes proceeded, was doubted by Lord Kenyon in Rex *v.* Parrot. But this case is at all events distinguishable; for there the profits of the lord arose immediately from a certain proportion of the ores brought to the surface without any expence or risk on his part; but here the ores are demised, and the landlords receive a certain money-rent for their interest in the land during the lease, whether any ores be raised or not; which rent is not the subject-matter of occupation within the parish. Then there is neither inhabitancy nor occupation, in respect of which the landlords can be rated in this parish.

Lord Ellenborough, C. J. The trustees can only be rated as inhabitants or as occupiers within the parish. We have so recently put a construction upon the word inhabitant in the statute of Eliz. as meaning a resident within the parish, that it is unnecessary to discuss the matter again; and the fact of such an inhabitancy is negatived by the case.

Neither

a species of rateable property, yet they are only rateable in two cases: 1. Where the proprietor resides out of the district for which the rate is made, they must be annexed to something real and substantial, locally situated within the parish or township rated. 2. In all other cases the owner must reside within the limits for which the assessment is made. (1)

Neither are they occupiers of the property for which they are rated; so far from it, that they cannot maintain trespass for any injury done to the property which they are supposed to occupy: and even if they were the actual occupiers of coal mines, they would not be rateable for them before they were worked and productive. But this is no more than a contract with tenants for the payment of a certain rent for ores supposed to lie under the surface, and if the tenants should open the ground and raise the ore, reserving a certain proportion of ore to the ground landlords. There is no occupation of any thing within the statute. If hereafter the tenants should open the ground and raise ore, the trustees will then be entitled to certain proportions, and such profits may come within a different rule, as lot and cope; upon which no question at present arises, and therefore it is unnecessary to say any thing.

Grose, J. was of the same opinion.

Le Blanc, J. If the trustees were rateable at all, it must be as occupiers of the mines or some proportion of them: but here they are rated as for a rent eo nomine, for which, if they were rateable, every landlord might by the same rule be rated for his rent.

Bayley, J. declared himself of the same opinion.

Order quashed.

Light-house tolls not rateable.

(1) Rex *v.* Rebowe, 1. Const. 142. pl. 177. Cowp. 583. S. C.

King Charles granted by patent to Sir Isaac Rebowe, liberty to erect light-houses at Harwich, and towards the maintenance of them certain tolls and duties payable by all ships passing or coming into that harbour; in pursuance of this authority two light houses were erected, which Mr. R. claimed under this grant and subsequent letters patent The duties he received annually amounted to 1400l. but only part thereof was received at the port of Harwich; the rest at many different ports in the kingdom. The collections were casual, as ships pass by or come into the harbour, and there was no other advantage arising from the light-houses. The defendant occupied these light-houses, by two men kept in his pay to light and attend the fire and lamps, who had a bed or beds in the larger light-house to lie on alternately. Mr. R. did not reside in the parish, nor was otherwise an occupier there, than as above. He was rated for the light-house in the same proportion to the land tax as to the poor rate. The

sessions were of opinion that he ought to be rated and assessed towards the relief of the poor of St. Nicholas parish, in respect of the said light-house, and the duties collected and paid as aforesaid. Lord Mansfield, C. J. They have properly speaking rated the fire, and the profits arising from the house: the Pantheon play-house and other places of public amusement are rated, I suppose, but not for their profits. We will, however, consider of it; but it seems to me at present that these duties are not rateable. Lord Mansfield. We took some time to consider of the case of Mr. Rebowe, and we are all of opinion that he ought not to be rated for the tolls. This property is not in the parish. They have not rated the house but they have rated the tolls. The tolls are not locally situated within the parish, and therefore not rateable there.

Non resident proprietor of light house tolls, not rateable.

Rex *v.* Inhabitants of Tynemouth, 12 East, 46.

Upon an appeal of Wm. Fowke, Esq. to the quarter sessions of the county of Northumberland, against a certain rate for the relief of the poor of the township of Tynemouth in that county, the sessions ordered the rate to be amended by striking out Mr. Fowke's name; subject to the opinion of this court upon the question, whether Mr. Fowke be rateable for the tolls in respect of the light-house? The facts were these. Mr. Fowke is entitled to Tynemouth light-house, and to certain tolls payable in respect thereof, by virtue of letters patent under the great seal in the 17 C. 2. viz. 12d. for every ship belonging to any of the King's subjects passing by the light-house, and belonging or trading to the ports of Newcastle and Sunderland, or either of them, or the creeks or the members of the same; and 3s. for every ship belonging to any foreigner or stranger coming or passing by the light-house. Mr. Fowke is also entitled to additional light duties under the act of the 42 G. 3. intitled "an Act for improving the Tynemouth-castle light-house, and for authourizing additional light duties in respect of such improvement." The alterations in the light-house have been made in conformity to the act. The light-house is in the township of Tynemouth; and the tolls and duties arising to Mr. Fowke are payable upon ships sailing in the German Ocean and receiving the benefit thereof; and the ships from which the tolls or duties arise never come within the township of Tynemouth, but proceed directly from the main sea into the river Tyne, the whole of which as far as Newcastle is in the port of Newcastle-upon-Tyne, and the parish of St. Nicholas within the town and county of the town of Newcastle-upon-Tyne: and neither Mr. Fowke nor any of the receivers of the tolls or duties reside in the township of Tynemouth. The tolls or duties paid in respect of ships arriving at and sailing from the port of Newcastle-upon-Tyne, are collected at the custom-house, in the parish of All-Saints, in the town and county of Newcastle-upon-Tyne, by Thomas Beck, a person appointed by Mr. Fowke for that purpose: and the tolls or duties paid in respect of ships sailing from other coasting ports are collected at the ports from whence they sail, if they clear at the custom-house there to a

port

Rex v. Tynemouth.

port beyond Tynemouth-castle light; if to a port short of Tynemouth, no toll or duty is payable by them in the first instance; but if they afterwards extend their voyage or passage to Newcastle, or beyond the light-house, then the toll or duty is paid at the port of their arrival. Some of the tolls collected at the coasting ports are remitted to Mr. Beck, at Newcastle, and others accounted for in the first instance to Mr. Fowke. The township of Tynemouth is within the parish of Tynemouth, and maintains its own poor. Mr. Fowke is rated for the tolls, in respect of the light-house, at 750l. The property-tax in respect of the tolls has been paid to the collectors of that tax in the township of Tynemouth.

Lord Ellenborough, C. J. It is no question now whether this property could be rated in some other way; as if the light-house, whose light is the meritorious cause of earning the tolls, were in consequence let at a larger rent: but this is a rate specially upon the tolls, and therefore the case is not distinguishable from the King *v.* Rebowe, which is so immediately in specie and in all its circumstances the same, and has been so long considered and acted upon as law, that it concludes the question. What local property is there within the township on which this rate on the tolls can be levied? The tolls are not received there; nor do the ships from which they are collected come within the township; the subject matter of the rate has no locality within this township.

Per Curiam,

Order of sessions, amending the rate, confirmed.

Rex *v.* Cardington, Cowp 581.

Tolls for passing a sluice, rateable.

This case came before the court upon a rule to shew cause why an order of sessions quashing a rate for relief of the poor of the parish of Cardington, should not be quashed as to the assessment upon Ashley Palmer, Esq. The case specially stated was that Ashley Palmer, Esq, was seised in fee of the right of navigation of that part of the river Ouse which lies between Erith in the county of Huntingdon, and the town of Bedford, and of all the tolls arising for the carriage of coals and other goods upon that part of the navigation: that he had power to erect sluices and staunches for the better keeping up the water and carrying on the said navigation, and that tolls were paid for passing through every sluice, and in a different rate for different sluices: that one sluice was erected in the parish of Cardington, at which the toll was 3d. a chaldron or load weight: that Mr. Palmer did not reside in the parish of Cardington, nor had he any person resident at that sluice to receive the tolls; but that the tolls for that sluice were received at Barford or Eaton: that neither Mr. Palmer, nor any other of the former proprietors of that navigation, were assessed to the poor's rates for their sluices or for the tolls or profits; but they had for many years been assessed to the land tax. Against the rule it was argued, that tolls and other yearly profits being specially charged in the land tax acts and not in the act of 43 Eliz. was proof that the parliament did not intend this species of property to be charged to the poor. Besides, as Mr. Palmer did not reside in the parish, nor was even the toll received in

in the parish, if assessable at all it must be assessed where received, and not in the parish of Cardington. And to this purpose was cited the case of Rebowe as directly in point. If any distinction could be made between the two cases, it was that the present was rather stronger than that; because there two persons were constantly resident in the light-house, the tolls of which were the object of the rate. But here, neither Mr. Palmer, nor any body who could represent him, resided in this parish. In support of the rule, it was contended, that this species of property, though not expressly within the words, was clearly within the meaning of the statute of 43 Eliz. That there could be no difference between these tolls and those of any other description; as the tolls of a market, or the like, which are clearly assessable to the poor. In the case of Rebowe, inquiry was directed to be made as to the tolls of bridges; when it appeared that Fulham bridge tolls were taxed at the rate of 500l. a year. Why not assess these tolls as well as them? As to the objection of their not being received within the parish, they might be received there if Mr. Palmer chose; they were not necessarily payable elsewhere. But the material thing was, that they arose within the parish. The consideration for which they were paid, was the passing through the sluice within the parish; and if a boat went no farther, the toll was to be equally payable. It was therefore completely due within the parish. The ground of the decision in Rebowe's case was, that the vessels did not come within the parish, therefore, the tolls were not due there; but here, they arose and were due within the parish. The court ordered the case to stand over, that inquiry might be made as to the custom of rating this description of property in other places. In answer to the inquiries, it was returned on the part of the plaintiff, that out of fourteen sluices, being the whole number erected upon this navigation, one only was rated to the poor; that the river Ivil, near Bury, the Northampton river Larke, Ouse, and Stower were none of them taxed. On behalf of the defendant it was stated, that the tolls at Marlow, Oxford, Reading, and several others on the river Thames, were all rated to the poor. Upon the whole, the court was of opinion, that these tolls were rateable; and therefore directed the rule for quashing the order of sessions to be made absolute, and affirmed the rate.

Rex v. Cardington.

Atkins *v.* Davis, Cald. 315.

Water works assessed under 27 Eliz. c 13

It was an action of trespass, in which the *trustees of the London Bridge water works* were plaintiffs, and the constables of the ward defendants. A verdict was found for the plaintiffs, subject to the court's opinion upon a case, stating the following circumstances:—The defendants had taken goods of the company by way of distress, pursuant to an order of the London sessions made under the riot act, upon the inhabitants of that city, to make good the damages recovered against them by actions brought in consequence of the riots in 1780. The company were not incorporated,

Atkins v. Davis.

rated, and the defendants had, as constables for the ward of Bridge Within, rated them for, 1st, Their offices, with the wheels and works for raising the water. 2d, A wharf. 3d, A house for their secretrary, detached from their works and wharfs. 4th, A fire-engine, used for raising the water to a proper height, also detached. And, 5th, The pipes, trunks, branches, &c. laid and dispersed in the different streets, not only in the city of London, but in the county of Middlesex, and borough of Southwark, for the conveyance of the water. The whole property is within the ward of Bridge Within, except the works, with their pipes, trunks, and branches on the Southwark side of the river; and except such parts of the pipes, trunks, and branches, as are a continuation from the pipes, trunks, and branches within the said ward, and which are from thence dispersed in the different streets out of the said ward, and out of the said city of London, *but are all originally derived from*, and connected with the pipes, trunks, and branches within the said ward. The profits arising from the water-works consist of rents paid by persons supplied with water from the works, and amount to 2500l. per annum; but of which 276l. 10s. is collected within the ward of Bridge Within, the remainder in Southwark, London, and Middlesex. All these receipts are accounted for by different collectors at the above-mentioned office, where the books and accounts of the company are kept, and all business transacted; but the money collected is paid to the treasurer without the ward.

The proprietors are rated to the land tax for their shares, under 21 G. III. c. 3. s. 57. The plaintiffs paid their assessment in respect of the wharf, the fire-engine, and secretary's house; and the question was, whether they were liable to the rate for the 1st and 5th articles, which constitute their water-works.

It was not stated in the case, whether the poprietors had any property in the land, under or over which the wheels, trunks, and pipes are laid. But it was observed by Lord Mansfield, C. J. that "it is most probable, that "though their title was not stated, "nor any thing concerning it, that "they had only the liberty to lay "them." The point turned upon the meaning of the statute of hue and cry, 27 Eliz. c 13. s 5. to which the riot act, 1 G. I. st. 2. c. 5. s. 6. refers. By 27 Eliz. c. 13. two justices are to assess the towns, parishes, villages, and hamlets; and after such taxation, "the constables "shall have power to assess, *according* "*ing to their abilities, every inhabitant* "*and dweller* towards the payment "of such assessment as shall be so "made by the justices."

The case however was argued in the court of king's bench, as if it had depended upon 43 Eliz. c. 2. respecting the poor's rate. The judges of that court were equally divided in opinion. Lord Mansfield, and Ashhurst J. holding, that these water-works were not rateable; Willes and Buller, Justices, that they were.

It was argued against rating them, 1st, That this kind of property never had been rated before, and that usage ought to prevail in a doubtful

Atkins v. Davis.

a doubtful case. 2d, That such things only should be rated as yielded a certain profit, and the profit here is uncertain, and depends upon constant labour and expence. 3d, No part of the property is rateable; not the pipes and trunks, for they cannot by any cultivation be made to yield a produce (1), and they are mere tools with which the plaintiffs labour; nor the fire-engine, nor the water, nor the arch of the bridge, for the leave to make use of the arch does not give any property in it, and the fire-engine which raises the water, is rated separately. It is therefore a rate on the profits made merely by the ingenuity of a man's head, the work and labour of his hands; which, whether done with or without mechanical tools, are not rateable property within the 27th or 43d Eliz.

The judges, who were of opinion on the other side, that these water-works were rateable, stated 1st, That usage of a particular district cannot make law against an act of parliament. 2d, These works were not attended with greater risk, expence, or uncertainty than farms or tolls, which are rated; and in assessing houses, the expence of building is never considered, but the house is rated as soon as *built* (2). 3d, That this is not a tax upon the pipes (a mechanical instrument), but upon the water, which, from yielding a profit, becomes a rateable subject. 4th, Being a personal, visible property yielding profit, it constitutes part of a man's "*ability*," for which he is to be rated.

The judges being equally divided the case was turned into a special verdict: judgment was given for the plaintiff "*pro forma*," and being removed into the exchequer-chamber, it was twice argued. The judges there gave no opinion, whether the works were rateable under 43d Eliz., but confined themselves to the 27th Eliz., to which the riot act referred, and which they considered as distinguishable in many particulars from the 43d Eliz. They were of opinion that these works, being property of a permanent, visible, annual, real value, were rateable under the 27 Eliz. which directs the constables to assess towards it, *according to their abilities, every inhabitant and dweller.* The judgment of the court of king's bench therefore was reversed.

Tolls rateable.

Rex *v.* Aire and Calder Navigation, 2 Term Rep. 660.

The churchwardens and overseers of Leeds in Yorkshire, by an assessment duly made and allowed, assessed the undertakers of the navigation of the rivers Aire and Calder for the tolls and duties of the said navigation at Leeds, at and after the rate of 1000l. per annum; and for their lands, wharfs, houses, ware-houses, and other buildings in their own occupation, at and after the rate of 27l. per annum. Against the former part of the assessment, the defendants appealed to the sessions, who affirmed the rate, stating the following case for

(1) But see Rex *v.* Corporation of Bath, 12 East, 609. post.

(2) Qu. "Occupied."

the

Rex v. Aire, &c. Navigation.

the opinion of this Court.—That the rivers Aire and Calder were made navigable by an act of parliament of the 10 & 11 W. III. which act hath been amended by a subsequent act in the 14 Geo. III. c. 96., under both which acts the undertakers are entitled to receive *certain tolls and duties therein mentioned, for all goods, &c. carried upon the rivers or cuts therein mentioned, according to the distance which such goods shall be carried* The whole strength of the navigation from Leeds to Wheeland measures twenty-nine miles, of which two thousand seven hundred and ninety yards in length, and no more, lie within the local limits of the township of Leeds. The whole tolls and duties arising upon the whole length of the navigation from Leeds to Wheeland or Selby, from the 1st of January 1785, to the 1st of January 1786, amounted to 8234l. 6s. 2d. exclusive of the tolls and duties arising from the navigation from Wakefield to Wheeland and Selby, and the average amount thereof for three years, before the 1st January 1786, was 7628l. 7s.—The proportion of the tolls arising from the two thousand seven hundred and ninety yards, part of the length of the navigation, and lying within the local limits of the township of Leeds, amounted to 403l 1s. 10d. per annum, and though upon the face of the assessment the undertakers stand only assessed at and after the rate of 1000l. per annum, yet as the houses and buildings within the township of Leeds are by the said assessment rated only at one moiety of the actual rents or real value, the undertakers stand actually assessed at and after the rate of 2000l. per annum. The undertakers of the navigation had in a year, commencing in July 1785, and ending July 1786, divided the sum of 17,000l. profits; but that sum was made up of many articles besides the tolls and duties. The tolls and duties have been regularly and uniformly rated at the towns of Leeds and Wakefield from the year 1713, and at Wakefield from the year 1759, at the annual value of 1200l. per annum; the length of the navigation within the local limits of Wakefield being one thousand one hundred and eighty-nine yards, and the tolls and duties arising upon that branch of the navigation from Wakefield to Selby or Wheeland, being more than that which arises upon the navigation from Leeds to Selby or Wheeland. The mills, warehouses, and other real property of the undertakers have been rated from time to time in the townships or places where such property lies. But the tolls and duties have not been rated in any of the townships through which the navigation runs, between Leeds and Wheeland, or Selby, or between Wakefield and Wheeland or Selby, except at the towns of Leeds and Wakefield. From the year 1792, the undertakers have invariably assessed for the tolls and duties, to the maintenance of the poor in the town of Leeds, at the value of 600l. per annum; and they, or their lessees, have paid the assessments according to that value. The tolls and duties arising upon the whole length of the navigation, have never in any one year during that space of time, amounted to the annual sum of 8234l. 6s. 2d. but in seven years during that time they have been considerably under that

annual

annual sum. In the year 1740, upon an appeal to this court, it was ordered that the undertakers should stand assessed at the value of 500l. per annum. In every land-tax act from the year 1709, is contained a clause, that the undertakers shall not be assessed to the land-tax in any other part, township, or place, through which the navigation runs, but at the towns of Leeds and Wakefield; and the undertakers have been uniformly assessed at Leeds at the same annual sums for which they have been rated to the poor's rate; and in the above-mentioned act of parliament of the 14th of His present Majesty is contained a clause, which enacts, "That the rivers, or any of the cuts under the authority of that act shall not be subject or liable to the payment of any taxes, rates, or assessments, save and except such taxes, rates, and assessments as had been and then were usually charged and assessed thereon."

Lord Kenyon, Chief Justice: The great question in this case is, whether the rate in question on this property has been assessed in a larger proportion than it ought? It is admitted generally, that this species of property is rateable; it is also admitted, that the justices at the sessions are the proper judges respecting the equality or inequality of the rate. In the case of Rex *v.* Brograve the court said, they could not enter into the inequality of the rate, unless it manifestly appeared to be unequal, and this rule appears to have been laid down with great wisdom by the judges who sat in this court at that time. It has been argued, that as the whole extent of this navigation has many miles, of which that which lies in Leeds forms but a small part, the rate in question exceeds its due proportion; but that is not the rule by which these proportions are to be ascertained. It is well known that the Duke of Bridgewater's navigation at Manchester extends thirty or forty miles, within three miles of the end of which the grand trunk empties itself, and of course the tonnage in that part of the navigation exceeds beyond all comparison the proportion in any other part of it. So that it is most probable that the part of this navigation which comes into the town of Leeds, is of greater value than any other part. However I disclaim forming my opinion upon any conjecture of this sort, though it is probably well founded, it being enough for me to say what was said by this court in the case reported in Burrow, that we cannot enter into the inequality of the rate, unless it be manifestly unequal upon the face of it. Therefore, without entering into any discussion of more points which are open to it, I am clearly of opinion that this rule ought to be discharged. Ashhurst, Justice, concurred. Buller, Justice, after noticing the other points of the case, said, then it becomes necessary to consider those facts in this case upon which the law arises; and it is material to observe, that it is not stated that the tolls are collected at any other place than Leeds and Wakefield; for if there were any other houses in different parishes at which the tolls are collected, it would make a difference; but on this state of the case, we are bound to take it, that all the tolls are collected at these two places. Taking that fact there-

fore as clear, I think the case which has been decided in this court must govern the present. It is material to consider at what place the tolls became due. I agree that if a person has property in Yorkshire, and receives the profits of it in London, he shall not be rated for it in London; for a toll must be considered to be paid at the place where it becomes due. It is impossible to adopt the argument used at the bar, that the toll becomes due at the end of every mile for that mile; for it is an entire contract to carry the goods the whole distance intended, and the hire is payable at the place to which by that contract they are to be carried. The case of Putney Bridge is an illustration of the present; there the bridge is rated in Putney and Fulham parish at 700l. a year in each, there being gates at each end; formerly there was no gate at Putney end, and then the bridge was not assessed in Putney at all. Grose, Justice, said, that this case was abundantly too clear to require any farther comment.—Rule discharged.

Tolls rateable where voyage completed.

Rex *v.* Page, 4 Term, Rep. 543.

The defendant having been rated towards the relief of the poor of the parish of Newbury, for the tolls of the navigation of the river Kennet, at 33l. 6s. 8d. after the rate of 20d. in the pound, on the sum of 400l., appealed to the Berkshire quarter sessions, where the rate was confirmed, subject to the opinion of this Court, on the following case. By an act 1 Geo. I. c. 24. for making the river Kennet navigable from Reading to Newbury, in the county of Berks, it is enacted, "that "in consideration of the great "charges and expences the under- "takers would be at, not only in "making the river navigable, but "also in repairing, &c. the works, "weirs, locks, &c. it shall be lawful "for the undertakers, &c. from time "to time, and at all times thereafter, "to ask, demand, &c. *for all and every* "*such goods, &c. that should be car-* "*ried or conveyed up or down the* "*river Kennet, between Reading and* "*Newbury, the rates and duties there,* "*after mentioned,* and that such place "or places adjoining to the river as "the undertakers, &c. should think "fit, viz. *for every ton weight of goods,* "*&c. that should be carried or con-* "*veyed in any boat, barge, or vessel,* "*up the river Kennet from Reading to* "*Newbury, or down the river from* "*Newbury to Reading, any sum not* "*exceeding four shillings;* and so "proportionably for every greater "or less weight, or for a less dis- "tance of place, to or from which "any goods, &c. should be carried, "&c.; and in case of refusal, "neglect, or denial of payment on "demand of the several rates, &c. "the undertakers, &c. or such other "persons as they should appoint "respectively, should and might "sue for the same by action of "debt, or upon the case in any "court of record, or detain or make "stay of any goods, or any vessel "carrying such goods, for which the "rates and prices ought to be paid "until they were satisfied," &c. By another act, 7 G. 1., after reciting that doubts had arisen since the passing of the former act, whether the undertakers were by the said act empowered to carry the navigation further than to the end of the borough of Newbury, they were empowered to make the river navigable from *the wharf or common landing place*, "in, at, or near Read- "ing, to a place called the Hospital, "in the borough of Newbury, "under

"under such authorities," &c. as were contained in the former act. By another act, 3 G. 2., the undertakers and proprietors were enabled to "seize, distrain, or detain any "boats in case of non-payment "of the tolls, and to cause the same, "&c. so distrained to be appraised "and sold." The length of the navigation from Reading to Newbury is eighteen miles and two furlongs; 142 yards of which are in the parish of Newbury, being the termination of the navigation. The navigation passes in its course through part of the respective parishes of Newbury, Thatcham, Midgham, Brimpton, Woolhampton, Padworth, Aldermaston, Burghfield, Tilehurst, St. Giles, and St. Mary, in Reading. The net amount of the tolls, *arising from the tonnage upon the whole navigation*, is of the annual value of 1000l. which arises as follows: (viz.) 400l. on the upward bound goods carried up from Reading to Newbury, and landed or unladen in the parish of Newbury; 400l. on goods laden at and carried down from Newbury to Reading; and 200l. on goods that pass only part of this navigation, and which never come within the parish of Newbury. All the tolls in respect of this navigation are collected at Aldermaston lock, in the parish of Padworth, about the midway between Newbury and Reading, by the agent of F. Page, the appellant, and have been there collected ever since the 5th February last. By the rate in question, the appellant is rated to the whole amount of the tolls arising from the tonage of goods carried on the navigation from Reading to Newbury, and landed at the bason in the parish of Newbury.

Lord Kenyon, C. J. This case does not admit of much doubt, whether it be considered on grounds of policy, on the words of this act of parliament, or on authorities. By the terms of this act of parliament, a toll of 4s. per ton is imposed on all goods carried up the river Kennet from Reading to Newbury; that toll of 4s. is one integral toll for that integral voyage. The case states, that many barges are navigated on this river, some of which perform the whole voyage up to Newbury, some the whole voyage down to Reading, and some intermediate voyages: and, in ascertaining this rate the sessions expressly state, that the rate is imposed on the appellant in respect only of the tolls which are received for goods, carried up the whole navigation from Reading to Newbury. The cases which have been cited do not bear upon the present. In the Hampton Wick case, the rate was on a piece of ground adjoining the river, which was used as a towing path. There the court had no difficulty in saying that the occupier ought to be rated for it, because he was in the possession of land yielding an annual profit. In Rex *v.* Cardington, it was stated that the tolls became due for passing through every sluice: that therefore was a local toll, payable at the place where the sluice was erected. In the Aire and Calder case no integral toll was imposed for the whole navigation, but a proportionable toll according to the distance which each vessel should go, at so much per mile:

Rex v. Page.

there it was sufficient to say that something was due at the extreme parishes, for which the undertakers were there rateable, without entering into the quantum of the rate. It was not necessary there to determine whether any thing were due in the intermediate parishes, because the tolls became due at so much per mile; it will be sufficient to decide that question whenever it arises. But arguments of policy and justice have been now urged; and it has been said, that the tolls should be considered to be due in each parish in respect of the quantity of land occupied by the navigation: but hard would be the lot of the officers who are to make the rates in these several parishes; they would have to measure not only the length but the breadth of the navigation in each respective parish, and to have to ascertain with precision the exact quantity of land covered with water: those difficulties would be insuperable; and it would be in vain to think of rating at all, if such were the rule. In the case of Putney Bridge, the toll was not apportioned in respect of the quantity of land over which the turnpike road led, but the toll was collected on the spot where it was held rateable. *The ground on which my opinion proceeds, is, that where a person has a valuable interest in any parish or township, he ought to contribute towards the relief of the poor in that parish in proportion to such valuable interest.* Here the appellant was rated in respect of those tolls only which became due at Newbury, the place where the navigation finishes, and where the goods were delivered. But it is said, that they were not in fact collected in Newbury, and that they became due where they were collected, the proprietor having power by the act of parliament of appointing the place of collection where he pleases; but certainly there is no justice in that; for the proprietor might appoint a place of collection not in any parish through which the navigation passes. What was said by my brother Buller, in the Hampton Wick case, that the tolls which became due in Hampton Wick could not have been rated in London if the corporation had chosen to receive them at Guildhall, is an answer to this part of the argument. And indeed it might as well be contended, that an estate is rateable where the steward thought proper to receive the rents. I am therefore clearly of opinion, that the justices in their sessions have done right in confirming this rate, by which the appellant is assessed only for those tolls which became due at Newbury in respect of the integral voyage from Reading to that place: but I desire that this opinion may not be applied to other cases, where the undertakers of a navigation are entitled to so much per mile for intermediate voyages.

Ashhurst, Justice. It being stated in the case that the annual value of the tolls for the whole navigation is 1000l., 400l. of which arise for the entire voyage ending at Newbury, I have no difficulty in saying that the latter tolls become due at Newbury the instant the goods are landed there. Though the proprietor on this navigation may, for his own convenience, appoint any place on the side of the river to collect the tolls, and though in fact they

they are collected out of the parish of Newbury, yet they become due at the place where the goods are landed. The case of Rivers *v.* Page, which was cited, I think must have proceeded on some other ground than that stated. I do not see how the owner of the navigation could distrain for the toll till it became due; and the toll did not become due till the voyage was completed. But here I think that the appellant should be rated for 400l. in Newbury, because tolls to that amount annually become due in that parish.

Buller, Justice. Two objections have been made against this rate: if either of them be well founded, the appellant must succeed. First, that the tolls ought to be rated according to the proportion of the navigation in each parish; or, secondly, that they should be rated at Aldermaston, where they are received, for which reason it has been argued, that they become due there. But under the express words of this act of parliament the proprietor may appoint what place he chooses from time to time; and therefore it would be very inconvenient to fix that as the place in which they should be rated. The true question here is, as it was in the Aire and Calder navigation, Where did the tolls become due? At common law there could be no doubt about this question; for if the goods be not carried to the place of destination, the captain of the vessel is not entitled to any freight; for this reason, that he has not performed his contract; he must go to the port of delivery before he is entitled to any thing. If that be so at common law, it becomes necessary to inquire whether this act of parliament has made any difference in this case. The statute gives the proprietor of the navigation a toll of 4s. per ton for goods carried from Reading to Newbury, and gives him the power of collecting those tolls where he pleases. But that does not alter the contract between the owner of the goods and the proprietor of the navigation: And though according to the case of Rivers *v.* Page, the tolls may be demanded before the voyage is performed, yet if the voyage be not afterwards completed, the owner of the goods may recover back the tolls in an action for money had and received. The clause in this act enabling the proprietor to collect the tolls in any place he chooses, was introduced for his benefit, but still the tolls must be demanded according to the rules of law respecting the carriage of goods from one place to another. This case falls directly within the principle of that of the Aire and Calder; where it was held, that the tolls ought to be rated in the parish where they become due; and that in the place of delivery. In the report of that case it is stated, that the undertakers were entitled to tolls, "according "to the distance which such goods "should be carried," that is, the whole voyage: according to my recollection the act of parliament in that case did not say that the undertakers should be entitled to so much for each mile; and though an act does mention the rate per mile, it is only used as the means of ascertaining what is due for the whole voyage; for the toll cannot be due till the voyage be completed.

Rex *v.* Page.

Grose, Justice. The short question is, whether this property be liable to be rated in Newbury? Which

Which depends on this, at what place are the tolls to be considered as property? Most clearly at the place where they become due; and I think they become due where the voyage is finished, for till then the carrier could not recover any thing at common law. But it has been said, that a case was decided in the common pleas, in which it was held that a distress might be taken for tolls before the voyage is perfected: if such were that case it must have been decided on the special provision of this act, which enables the proprietor of this navigation to collect the tolls where he pleases. But that clause did not mean to say that the tolls did not become due in law at the place where the voyage was completed, and where the goods were landed and delivered. The observation of my brother Buller is decisive of this head, that even after a distress the owner of the goods might recover back the tolls, if the voyage were not afterwards performed, and the goods delivered according to the contract. Then it was argued, that the appellant should be rated for these tolls at Aldermaston, where they are collected; but if we should so determine this case, we should open a door to fraud; for then the proprietor would fix the place of collection in some parish where the poor-rates are the lightest, which could not be within the meaning of the act. Order of sessions affirmed.

Canal tolls rateable where due.

Rex *v.* Staffordshire Canal, 8 Term Rep. 340.

The defendants appealed to the quarter sessions for the county of Worcester, against a rate made in December last for the relief of the poor of the chapelry or hamlet of Lower Mitton, in the parish of Kidderminster, in the county of Worcester, whereby they were rated for "their basons, towing-"paths, and that part of their ca-"nal and the locks lying within "Lower Mitton, and for the tolls "and duties arising therefrom due "at Lower Mitton, on 1500l. at "the sum of 75l.; for their lands, "wharfs, cranes, weighing ma-"chines, and timber-yards in their "own possession on 12l. at the sum "of 12s.; and for part of Jones "land in their own possession on "2l. 10s. at the sum of 2s. 6d." On hearing the appeal the sessions confirmed the rate on the company for their lands, wharfs, cranes, weighing machines, and timber-yards in their own possession, on 12l. at 12s. and for part of Jones land also in their possession, on 2l. 10s. at 2s. 6d. without opposition. The court also confirmed the rate on the company for their basons, towing-paths, and that part of their canal, and the locks lying within Lower Mitton, and for the tolls and duties arising therefrom due at Lower Mitton on 1500l. at 75l. in manner following, viz. they confirmed the rate of 75l. upon the said 1500l. so far as respects 350l. (part of the sum of 10,000l. after mentioned), payable for and in respect of the lock duties on passing through the locks lying within Lower Mitton hereinafter described without opposition; and they also confirmed the rate of 75l. upon the said 1500l. so far as respects the residue of the said 10,000l. aftermentioned, payable for and in respect of the tolls and duties due at Lower Mitton, hereinafter also described,

Rex *v.* Staffordshire canal.

scribed, subject to the opinion of this court, as to the last charge, on the following case. The rate was duly allowed and published. By an act of the 6th of Geo. 3. the company are empowered to take rates and duties for tonnage and wharfage for all goods conveyed on the canal not exceeding 1½d per mile for every ton, and so in proportion for any greater or less quantity than a a ton: which rates and duties are directed by the act to be paid to such persons, at such places near the canal, in such manner and under such regulations, as the company shall appoint; with a power of distress in case of non-payment. It is further enacted, that for the more easy collecting of the rates and duties, the master, &c. of every vessel navigating on the canal shall give a just account in writing, signed by him, to the collectors of the tonnage or duties, at the places where they attend for that purpose, of the quantities of goods in such vessel, from whence brought, and where they intend to land the same; and if such goods be liable to pay different tolls, then such master, &c. shall specify the quantities liable to the payment of each toll; and in case they neglect or refuse to give such account, or give a false account, or deliver any part of their loading at any other place than is mentioned in that account, they are to forfeit to the company 10s. for every ton of goods so falsely accounted for, &c. over and above the respective rates and duties payable for the same, and recoverable in the same manner, &c. By another act of the 10th Geo. 3. the company are authorised to take tonnage proportionably for any less distance than a mile, which any commodities shall be conveyed on the canal, to be collected, recovered, and applied as the former tonnage rates; and the vessels, &c. passing through the two locks erected between the river Severn and the canal bason, are to pay a toll or lock due at the rate of 1d. per ton, in lieu of the tonnage of 1½d. per mile fixed by the said recited act; and the said tolls or lock dues are to be collected, recovered, and applied as before directed, &c. By the same act of the 10th Geo. 3. it is enacted that the shares of the company, which by the former act the proprietors held in the nature of real estates, shall be deemed personal estates, &c. The lock dues received by the company in the last year for boats and other vessels passing through the said two locks, which locks are locally situated in the hamlet of Lower Mitton, amounted to 350l. The tonnage of the goods brought in boats down the canal and landed at Stourport, which is in the hamlet of Lower Mitton, and the termination of the canal, or transhipped therefrom on board canal boats to Severn barges, amounted in the year 1798 to 9650l. making together with the said 350l. the sum of 10,000l. which sum of 9650l. arose in the following manner, viz. [Here the case set forth the different sums received for the tonnage of goods taken in at different places on the canal, shewing how much the tonnage amounted to in each parish, reckoning by the number of miles that the canal passed in the several parishes; according to which mode of calculation, by the mile, a very small part of the toll arose in Lower Mitton.]

Rex v Staffordshire canal.

Rex v. Staffordshire canal.

ton.] But the said sum of 9650l. was not received by the company at Lower Mitton, but at the several places where the goods were shipped. The expences of repairing the bason and that part of the canal which lies within the hamlet amount annually to 540l. other parts of the canal and basons lying out of the hamlet are also repaired at a great annual expence; and the repair of every part contributes to the profits and use of the whole canal. The dividends per share of each proprietor of the canal for the year 1798 amounted to 32l. clear of all expences and deductions. The agents of the company on receiving accounts in writing of the quantities of goods which are in each vessel, and the places where the same are intended to be landed, in the manner required by the first act, deliver permits to the master, &c. of every such vessel, &c. to navigate the same accordingly upon the canal. The company are not carriers upon the canal, nor the owners of any vessels employed thereon; and the payment of the tolls on goods carried on the canal is by the direction of the company made to their agents at the places where such goods are laden or shipped, and the company consider such places as the places at which they become due under the act. The land used in the canal, the towing-paths and basons lying in the hamlet of Lower Mitton, measure 8 a. 2 r. 13 p.; and the land used in the whole of the canal towing-paths, and basons measure 370 a. 2 r. $7\frac{8}{4}$ p. The length of the whole canal is 46 miles and an half, amounting to 81,840 yards; 1367 yards of which, including the length of the bason, and measuring to the Severn lock, being the termination of the canal, lie in the hamlet of Lower Mitton, so that that part of the canal which lies within the hamlet bears to the whole length of the canal the proportion of about one to sixty.

Lord Kenyon, C. J. I consider that this case is brought forward to give us an opportunity of reviewing the opinions we delivered in the former cases that have been alluded to: but on re-consideration, I do not see any reason to induce me to change the opinion I then gave. In the first of those, R. v. The Undertakers of the Aire and Calder Navigation, which was decided soon after I came into this court, though it differs from the present case, some rules were established applicable to this case. But I cannot distinguish the other case, R. *v.* Page, from the present in principle and in substance, though there are some nice distinctions between them. And if the rules there laid down had occasioned any great inconvenience, the parties interested have had in the interval of several years many opportunities to apply to the legislature for a remedy; but no application of that kind having been made, I presume that no inconvenience has resulted from those determinations. This does not appear to be a contest between the parishes through which the canal passes and the company of proprietors, but the company are struggling against the rate altogether. To this company indeed, as well as to others of the same kind, the public are much indebted for their undertakings, but they ought to contribute to the relief of the poor, in common with the owners of all other species of property.

perty, in proportion to the profits that they acquire. As the company have objected to the present mode of rating, I am anxious to know what other mode they would substitute for it: on this point, however, their counsel have left me in great doubt. They gave me the choice of two modes; they wish the company either to be rated for the whole in the parish where the tolls are received, or for the different parts in the different parishes through which the canal passes, in proportion to the number of miles in each parish, but they have not named that mode on which they choose to rely. I rather think that they would not be satisfied with the first of those methods; because after receiving the tolls in one parish for the whole voyage, it is too much to say that the company should retain them in the event of the owners of vessels not being able to go the whole voyage; either on account of the locks being out of repair, the banks giving way, or any other accident of that kind. It is not therefore the most convenient place to rate the tolls where they are collected. Then it is said that the other mode of rating should be adopted, because the land over which the canal passes was before rateable to the poor in respect of its produce. But insuperable difficulties occur to this mode. It is admitted, that all property should be rated to the poor according to its meliorated state: but on account of the difference of the expence attending the cutting of a canal in flat and hilly countries, it is almost impossible to ascertain the precise degree in which the property is meliorated in each particular parish.

Rex v. Staffordshire canal.

The bar are already in possession of the reasons which we gave in the case of R. *v.* Page, and therefore it is not necessary to repeat them. It seems to me, after reviewing the whole of the subject, and considering which is the most eligible mode of rating the property in question, that the mode adopted below is that which approaches nearest to justice. It is sufficient therefore to say, that I continue to think that the case of R. *v.* Page was rightly decided, and as I cannot distinguish this case from that in principle, the present rate must be confirmed.

Grose, Justice. The great object in this case is to find out the true principle according to which the tolls ought to be rated. This very point was much considered in the case of R. *v.* Page, where, after the best consideration that I could give to the subject, it appeared to me that tolls of this kind should be rated where they become due: and I cannot, on re-consideration, discover any other mode of rating less exceptionable than that. That mode may possibly be liable to some objection, and so is every other mode that has been suggested: but that mode appears to be most consistent with the justice of the case, and to be attended with fewer difficulties and objections than any other, and it is not inconsistent with any clause in the act of parliament by which the tolls are imposed. The Lord Chief Justice has stated his objections to both the modes of rating proposed by the company; and I entirely agree with his lordship on those points. In answer to one argument at the bar, that the money was not paid for the tonnage but for permission to pass on the navigation, it is

Rex v. Staffordshire canal.

sufficient to refer to the act of parliament, which empowers the company to take tonnage for all goods conveyed on the canal, such rates and duties, &c. not exceeding 1½d. per mile for every ton; the rates therefore, are not payable until the goods are conveyed, for until they are conveyed it is impossible to say how much will become due. For though the money may be paid in advance for the convenience of the company in many instances, it must be returned if the voyage cannot be completed, because until the voyage is completed no money becomes due under the act of parliament. On the whole therefore, I think that the mode of rating adopted in the case of R. *v.* Page, which seems less objectionable than any other, ought to be adopted in the present case.

Lawrence, Justice. The company, who object to the present mode of rating, say that they should be rated for the tolls either in the parish where they are collected, or in the several parishes through which the canal passes, according to the distance in each. Their counsel would not absolutely choose the first; they seemed rather to prefer the latter mode. But considering that this is a rate on tolls, the proprietors of the tolls must be rated either in the parish where the tolls become due, or in that where they are received; but I think they cannot be rated in the parish where they are actually collected, because many cases may be put in which the tolls, though received, must be returned to the owners of the goods. Therefore it seems to me that the tolls should be rated in the parish where they become due, that is, where the voyage is complete; and what was said by Mr. J. Buller, in giving his opinion in R. *v* Page, comparing this to the case of a carrier, deserves great weight. But it has been argued that this resembles the case of R. *v.* Cardington, where the tolls became due on passing the sluice; but it must be remembered that there the toll was paid for the use of the lock; and if the owner of the vessel after paying the toll, had been prevented pursuing his voyage, he could never have recovered back his money, because he had the use of the lock. Nor is this like the case of a turnpike; for there the tolls are paid for the benefit of the public, and not for the use of any individuals, and those tolls are not the subject of taxation, within the 43 Eliz.; there also the money is paid for the privilege of passing through the gate, and the party having once paid it, cannot under any circumstance, recover it back again. It seems to me therefore, that this question was very rightly settled in R. *v.* Page, which case cannot fairly be distinguished from the present.

Le Blanc, Justice. This is a rate on tolls and not on land. It is admitted that tolls, as such, are rateable property, and that such property is rateable in the parish where it rises; now it was decided in R. *v.* Cardington and other cases, that by this expression, where it arises, we are not to understand the parish where the tolls are actually received, but the parish where they become due. The question then, in this case, is, where do these tolls become due or payable? It has been said that the tolls are not paid to the company in respect of a contract for the carriage of goods, but for the privilege or liberty of carrying goods on their navigation:

Rex v. Staffordshire canal.

vigation: but in each instance, it is an entire contract to pay so much for the liberty of carrying goods for a certain space along the canal, and until the contract on the part of the company, giving the privilege of carrying the goods on their navigation, is performed, nothing becomes due to them. If the contract be for sending goods the whole length of the navigation, the contract is not performed on their part, and nothing becomes due to them for tolls until the goods are conveyed to Stourport: if the contract be for the privilege of conveying goods an intermediate voyage, to some place short of the whole distance, the tolls do not become due until such shorter voyage is performed. But this very question has been already determined in the case so frequently alluded to, R. *v.* Page; and unless the court felt that there were some strong objections to the mode of rating adopted in that case, that decision ought to govern the present case. Now no mode of rating these tolls more consistent with justice or with policy than the rule there adopted has been pointed out. The counsel for this company have indeed contended that this case is distinguishable from that in this respect, that there the toll was limited at a gross sum, (4s. per ton) for the whole voyage, and so proportionably for a greater or less distance, whereas here the toll is 1½d. per ton, per mile: but there is not in reason any distinction between the two cases on that account; in the one case as well as in the other, the rate of tonnage is calculated at so much per mile. Not being able, therefore, to distinguish that case from the present, nor seeing any ground on which I can say that that decision is not consistent with the rules of law or public policy, I am of opinion that the order of sessions must be confirmed.

Per curiam,

Order of Sessions confirmed.

Non resident not rateable for Ferry tolls.

The King *v.* John Nicholson, 12 East, 330.

John Nicholson appealed to the sessions against a rate made for the relief of the poor of the township of Monkwearmouth-shore, in the county of Durham, whereby, as lessee of an ancient ferry from and between Sunderland, near the sea, in the said county, and Monkwearmouth-shore, he was rated for the tolls of the same. The sessions confirmed the rate, subject to the opinion of this court on the following case.

The appellant Nicholson is an inhabitant of and lives in Sunderland, which town lies close to the sea, at the mouth of the river Wear, which divides the parish of Sunderland from the township of Monkwearmouth-shore, on the north side of the river, maintaining each their own poor. There is an ancient ferry for horses, goods, and passengers, which crosses the river from Sunderland to Monkwearmouth-shore, and from Monkwearmouth-shore to Sunderland. This ferry until 1795, was leased by the Etrick family under the bishop of Durham, when it was purchased by, and now belongs to the commissioners of Wearmouth bridge; and the ferry and the tolls thereof are at present let by them on a lease for three years from Martinmas 1808 to the appellant, at the yearly rent of 350l. There are two large boats, which keep plying all the day to and from Sunderland and Monkwearmouth-shore, and which are towed by two in each boat, and the fare

Rex v. Nicholson.

fare or tol paid for a person passing in the ferry is a halfpenny each way; and of late years for convenience it has been accustomed to collect the money of the passengers as they enter the boat on either side of the river instead of when they go out, as it used to be done formerly; and one boat puts off from one side of the water when they see the other put off from the opposite side. There is a small boat also goes to and from Sunderland and Monkwearmouth-shore during the night; and the inhabitants of Monkwearmouth-shore, who are customed as after-mentioned, pay the same toll or fare of a halfpenny as persons not customed do, if they go over in this night boat. The respective boats when not used have always been locked up on the Sunderland side of the water, close to the place where the passengers get in on that side. Previous to the year 1710, a dispute having arisen between Anthony Ettrick, Fsq. the then lessee under the bishop of this ferry, and Sir Wm. Williamson, Bart. respecting the ferry landings on his estate in the township of Monkwearmouth-shore and the ferry dues to be paid by his tenants in Monkwearmouth-shore for passing the ferry, it was referred to arbitration: and by an award dated 25th March, 1710, two places were set out by the arbitrators for the ferry landings in Monkwearmouth-shore; and the one of them, which is called the high landing in the award, is the place where the ferry now lands, and has for a great many years past. And the ferry dues to be paid by his lessees and tenants in Monkwearmouth-shore were also fixed by the arbitrators; namely cottage 2s. 6d. and a dwelling-house 3s. for one year's passage of the lessee's tenants or inhabitants of each cottage or house; and the ferry was to land from thenceforth in no other place in Monkwearmouth-shore but the two places set out by the arbitrators. The ferry dues settled and ascertained by that award for the passage in the ferry-boats of the lessees, tenants, and the inhabitants of the cottages and dwelling-houses situate in Monkwearmouth-shore, have been paid ever since to the tenant or occupier of the ferry for the time, and are reserved and confirmed to the same lessees, tenants, and inhabitants, in the act passed for the erection of Wearmouth bridge in 1792, and amount to from 80l. to 100l. a year. The ferry has always until the year 1802, when it was let to one Thomas Wandless, who lived in Monkwearmouth-shore, been let to persons living in Sunderland, and been rated to the poor of Sunderland for the whole of the tolls or ferry dues; and it has at different times been also rated to the poor of Monkwearmouth-shore; but nothing was ever paid to that township until Wandless took the ferry; when the parish of Sunderland having raised his rate, in consequence of his having given an additional rent, he objected to pay, on the ground that part of the tolls of the ferry arose and became due in the township of Monkwearmouth-shore, and were liable to be rated to that township; and the township of Monkwearmouth-shore having rated him for a part, he appealed against the Sunderland rate, on the ground before mentioned, to the sessions at Durham in July 1805, when the point was abandoned by the respondents,

dents, and Wandless's rate to Sunderland was amended, and reduced to half of the tolls of the ferry; and the ferry has since been continued to be rated to Monkwearmouth-shore for one half of the tolls or ferry dues, including one half of the custom money, and for the other half thereof, including the remaining half of the custom money to Sunderland. The number of passengers from Sunderland to Monkwearmouth-shore are about the same as from Monkwearmouth-shore to Sunderland. The place where the ferry lands in Monkwearmouth-shore is of little or no value of itself, in case it was not used for the ferry landing. No question arose in this case as to the quantum, for it was admitted that the appellant was properly rated in the township of Monkwearmouth-shore as to quantum, in case he is rateable there at all for any part of the tolls or fees arising or received from or in respect of the ferry-boats. The sessions being of opinion that he was rateable for a moiety of all such tolls or fares, including one moiety of the custom money aforesaid, confirmed the rate.

This case was now argued by Holroyd, in support of the order of sessions establishing the rateability of the appellant for the profits of the ferry, and by Hullock against it: and as the case of Williams *v.* Jones, next reported, which was argued in the last Term and stood over for consideration till the argument in this case had been heard, involved the same general question, I have collected together in this place all the leading arguments and authorities adduced by the respective counsel for and against the rateability of this species of property. Rex v. Nicholson.

In affirmance of the rate it was urged that the ferry was real property; an incorporeal hereditament within the parish; local in its very nature; and having locality assigned to it by law: demandable in a præcipe quod reddat, in counting upon which it must be claimed as situated in such a parish, &c. an assize clearly lies for it, the owner may prescribe for it, and have seisin in fee of it, considered as a franchise, it is a real franchise, the exercise of which is necessarily confined to a certain place. One of the landing places is within the township, to which the defendant is rated, and a moiety of the tolls becomes due and is collected there. There is no distinction in principle between the tolls of a ferry and those of a market or canal: the former were held rateable in the case of the corporation of Wickham (1) confirmed in Atkins *v.* Davis (2), and in the Staffordshire and Worcestershire canal case (3), the proprietors who were empowered by act of parliament to take so much per mile per ton, for all goods carried along the canal, were not only held rateable for their lands, wharfs, &c. and other real property in the occupation of their servants, but also for the tolls which became due in the several parishes on the line of the canal where the different voyages ended; though for their convenience the company were authorised to collect the tolls where they pleased, and did in fact collect them in other parishes. Part of the rate there was specifically on the tolls and duties arising from the navigation on the canal, due

(1) Ante. (2) Ante. (3) Ante.

at

Rex. v. Nicholson.

at Lower Mitton; the case was argued as a rate on tolls contradistinguished from land, &c., and decided on the ground of the tolls, as such, being rateable in the parish where they became due, as arising and becoming visible property there. The like decision upon the same principle had before been made in the King *v.* Page, [Lord Ellenborough C. J. In those cases the question did not turn so much on the rateability of the property, considered merely as tolls, as on the proper place where they were to be rated; for in all these cases the tolls were in respect of the land and soil of the canal which was vested in the proprietors. In general the rate has been imposed on some real property in the parish out of which the tolls arose as on the sluice, in the King *v.* Cardington, and in the Salter's Load sluice case. Bailey J. all the cases of tolls held rateable have been where the tolls arose out of the use of land.] Yet in Atkins *v.* Davis, Buller J., speaking of the case of the King *v.* Cardington, said, that Palmer, who was there rated in respect of the tolls, had no property either in the soil or in the water, but had merely a power of erecting sluices and taking tolls. Neither was the soil of the Aire and Calder rivers vested in the undertakers of the navigation, yet in their case the tolls and duties of the navigation, which they were authorised to collect by act of parliament, were held rateable, (apart from the lands, wharfs, &c. in their own occupation,) in the two parishes where the collection was made in respect of the whole line of the navigation, which ran through several intervening parishes. So in the case of the Leeds and Liverpool canal, the company were rated specifically for their tolls of the navigation as well as for their warehouse and land. [Lord Ellenborough C. J. The undertakers of the Aire and Calder navigation had I believe real property in the parishes where the tolls were collected; and the rate was upon the tolls conjoined with that property, which property was rendered so much more productive by reason of the tolls collected there. So in the Leeds and Liverpool case it was a conjunctive rating. The tolls were held rateable for the canal within the parish. But is there any case of rating tolls where the owners had no land or visible property in the parish?] In every case where tolls have been rated as well as land, the order of sessions confirming both conjunctively ought to have been quashed instead of being confirmed, if the court had not considered that both were rateable. [Lord Ellenborough C. J. The great difficulty is to bring the case within the words of the statute 43 Eliz. c. 2. conferring the authority. The party rated must be either an inhabitant of the parish, or he must be an occupier of one or other of the descriptions of property mentioned in the statute: and within which does this appellant come? The case states him to be in fact an inhabitant of another place.] He may be considered as an occupier of land in respect of the use which he has of the water which covers the land, and is part of the realty. The word lands is used in the statute as the nomen generalissimum for every

every species of real property, incorporeal as well as corporeal: "all "lands, and all real property, are "rateable to the poor," said Mansfield in Rex *v.* Gardner. At all events he may be considered as an inhabitant of the township within Lord Coke's extended signification of that word in his construction of the statute on bridges, as comprehending all who have lands and tenements in possession, though living in a foreign country. In like manner the stat. 43 Eliz. may be taken to include every person occupying any species of property, or exercising any local franchise producing profit to him within the township; for this forms part of his ability there. A lessee of tithes, though he do not reside within the parish, is certainly rateable. This is not the case of a mere easement, but the party has an interest in the place. The tolls of a lighthouse were held in a late case not to be rateable, because neither the ships in respect of which the tolls became due were within the parish, nor were the tolls received there: that case therefore does not conclude the present.

Against the rateability of tolls, it was contended that the question was one of strict construction upon the words of the stat. 43 Eliz. c. 2. by which alone the power of rating to the relief of the poor was given. The statute directs the necessary sums to be gathered out of the parish according to its ability by taxation of every inhabitant, &c. and of every occupier of lands, &c. and no man can be rated except as an inhabitant or occupier. Here the case negatives that the appellant was an inhabitant of this township; and the only question which can be made is, whether he were an occupier of lands. [Lord Ellenborough, C. J. asked whether the counsel were aware of any case where the word inhabitant in the statute of Eliz. had been held to mean any other than resident: and was answered that there was no such case: that the question was raised in the Liverpool and Hull cases. In every case where a rate in respect of personal property has been established, the party rated has appeared to be an actual inhabitant of the place. It is argued that the word lands includes all real property, and that a ferry is real property; but no authority has been cited for that position: no instance has been shewn of an ejectment brought for a ferry, or of a præcipe quod reddat lying for it. But however that may be, that is not the criterion for its rateability The rule was laid down in the King *v.* Andover, and has been long established, and lately recognized in Rex *v.* St. John Maddermarket, in Norwich, that a person is only rateable for his local visible property within the parish: the property must be visible and tangible to make it the subject of occupation. When, therefore, this is argued to be an incorporeal hereditament, it does not follow, nor is there any authority to shew, that a person is rateable for an incorporeal hereditament in the place where he does not reside. The specific mention of tithes in the statute bears against the argument, and shews that without such express mention the owner would not have been rateable for that species of property under the general word lands; and ex-

Rex *v.* Nicholson.

Rex v. Nicholson.

expressio unius est exclusio alterius. This is a rate on the tolls of a ferry, in other words, upon the profits made by the manual labour of working the ferry boats, that is, upon the freight of the boats; and that too in a place where the owner does not reside, and where the boats are not kept. And though if he were an inhabitant of the township the ferry boats of which such profit was made might furnish a local visible criterion of the party's ability, yet in no other character could he be rated for such profit. The right of conveying persons from one side of the highway to the other is a mere franchise or privilege: the right of landing on the soil of the highway is common to all the kings subjects alike: so far, therefore, from the owner of the ferry having any interest in the soil itself, he has not even the inclusive right to the use of it. Other boats may land there, though they may not carry passengers or cattle for hire. [Lord Ellenborough, C. J. The owner of the ferry may be said, perhaps, to have a right to make a special use of the highway; but he cannot be said to have the occupation of the highway.] It is merely toll thorough, which is taken for passing over the highway, in consideration of repair or other benefit done by the owner of the toll, but without any interest or claim in the soil; and not a toll traverse, which originates in the liberty given to pass over the owner's soil. In Jolliffe's case the granter of a way-leave, which is a mere easement, was held not to be rateable for it: and a ferry is no more than a public easement. All the cases of rating in respect of real occupancy have been where the subject matter was corporeal visible property in the parish, whatever the form of the rate may have been. In the case of the market toll of Wickham, the corporation were probably the owners of the soil. In the other cases, where tolls have been rated, the persons have been rated for them conjunctively with tangible real property, out of the use of which they arose, such as sluices, towing-paths, engines, boats, wharfs, warehouses, canals, and the like: but in Rex *v.* Rebowe (1) and Rex *v.* Tynemouth (2), the tolls of a light-house were held not to be rateable, whatever the light-house itself might have been under different circumstances. Turnpikes are said not to be rateable on account of the application of the tolls to public purposes; but though they were private property, the occupier would only be rateable for the turnpike house, and not for the tolls *eo nomine*. And in the case of the sluice, being fixed to the freehold, it could be no other than real property; capable therefore of occupation, and the occupier of which had such exclusive possession of it as would have enabled him to maintain trespass.

Lord Ellenborough, C. J. There was a case of Williams *v.* Jones, argued in the last term, which in principle is the same as the present, and will be governed by it, unless the court should hereafter see any special ground on which to distinguish it. The rate is here imposed on the tolls merely of the ferry: and the question is, Whether the proprietor of the ferry, who is not an inhabitant of the township in which he is rated, be liable to be

(1) Ante. (2) Ante.

rated

rated for such tolls received by him there? and this being a question upon the construction of the stat. 43 Eliz. c. 2. it is material to look to the words of it. By that statute the parish officers, by consent of two justices of the peace, are directed to raise a competent sum for the relief of the poor by taxation of "every inhabitant, parson, vicar, "and other, and of every occupier "of lands, houses, tithes impropri- "ate, propriations of tithes, coal "mines, or saleable underwoods in "the said parish." Now, tolls do not come within any one specification of occupancy described by the statute: they are not lands, nor houses, &c. If, therefore, the owner be taxable for them at all, it must be as an inhabitant of the parish out of which they arise: but there is no case in which the word inhabitant in that statute has been held to mean any other than a resident within the parish. In the cases which have occurred of rating in respect of personal property, such as the King *v.* Liverpool and the King *v.* Collison, which are mentioned in the King *v.* Jones, residence was considered necessary to constitute inhabitancy. But we are reminded of cases where tolls arising from navigable canals, to which the tolls of a ferry are assimilated, have been held rateable without any reference to the question of inhabitancy: and the Wickham case is much relied on, where a corporation was held rateable for market tolls: but they were the lords of the soil where the market was held, in respect of which they were rated for the tolls. In the case of the King *v.* Cardington, the rate was specifically upon the sluices, on that which was local and visible property, and producing profit within the parish; and all the cases where tolls have been held rateable, when they are examined, will be found to have proceeded on that ground. It was so in the case of the Staffordshire and Worcester canal: the company were there rated for "their basins, towing-paths, and that part of their canal and the locks lying within Lower Mitton, and for the tolls and duties arising therefrom due at Lower Mitton. There could be no doubt that the basins, towing-paths, canal and locks, were local visible property there, and the tolls and duties arising therefrom, classed and connected as they are with the local visible property rated, were considered as resulting from that local and visible property. In all these cases the tolls have arisen from the use of the canal, which is local and visible, being part of the land itself, lying within the parish where the tolls have been rated. But there is no case where tolls detached altogether from local real property have been held to be rateable *per se*. When therefore, we are called upon to decide such a question for the first time, I am am always disposed to go to the fountain head, which is the act of the 43 Eliz.; and looking at the words of that act, I do not find any of them which extend to rate any person not being an inhabitant of the place, nor the occupier of any of the specific kinds of property mentioned in the act. And not finding any description in the statute

Rex *v.* Nicholson.

Rex v. Nicholson.

tute which applies to the case of this appellant, I cannot hold him to be rateable for these tolls.

Grose J. declared himself of the same opinion for the reasons given by his lordship, which he thought it unnecessary to repeat.

Le Blanc J. the appellant is rated specifically as the lessee of the ferry for half of the tolls or ferry dues in the township of Monkwearmouth-shore: and it is found that he is an inhabitant of and lives in Sunderland, and it is not stated, that he is the occupier of any property in Monkwearmouth-shore; and that brings it to the simple question, whether a person residing out of the township be rateable there for the tolls of a ferry, which tolls arise and become due to him for carrying passengers and cattle from one shore to the other, one of which lies in the township. The origin of his rateability, if it exist at all, must be sought for in the stat. 43 Eliz. which does not extend in terms to this case. At the same time if the words of it had received so extended a construction as to include this case in the various decisions which have taken place upon the rating of the proprietors of canal navigations, I should have been disposed to adhere to the settled course of construction. But this point not having been decided in those cases, I cannot, upon reverting to the words of the statute, consider the appellant as coming within any of the description of persons rateable there given. It is contended that he is an inhabitant of the township within the meaning of the act, and that he is also within it as an occupier of real property. Now, when the word inhabitant is used as well as occupier, I must consider that by the former was meant a person who was resident in the place; for one might occupy without being resident, and the statute meant to include both: but this appellant is found to have been resident in Sunderland, and in that sense is not an inhabitant of Monkwearmouth-shore. Then as to his occupation of real property in the latter township; if this ferry and the tolls be real property, still the appellant is not the occupier of such real property as is mentioned in the act of parliament. But they are compared to the tolls of a canal, which it is said have been held to be rateable property within the statute: it will be seen, however, upon examination, that in all those cases, the parties claiming the tolls for which they were rated had an interest in some local and visible property within the parish connected with their interest in the tolls; as where they were made payable at their own wharfs or warehouses, where the goods carried on the canal were received or deposited, or in respect of the line of canal by which they were carried, passing through the parish where the tolls were rated. The case of the owner of the packet-boats comes very near to that of a person who has an exclusive right of carrying passengers and goods in a ferry-boat; but the packet owner was only held to be rateable for his profits in the parish where he resided, and where the boats were kept, and produced the profit to him; and he was considered not to be rateable in any other place to which the boats sailed where he was resident. The appellant, therefore,

is

is not rateable for this property within the words of the statute, or the decided cases upon it either as an inhabitant or as an occupier.

Bayley J. This person is neither an inhabitant of the township within the meaning of the statute, nor an occupier of any of the species of property mentioned in it: and when we are called upon to put a construction on the act for the first time, we ought to abide by the words of it. In a statute which mentions inhabitants as well as occupier, inhabitant must mean resident, otherwise it would for this purpose mean the same as occupier. But the appellant is said to be an occupier of the tolls, and that tolls have been held rateable co nomine in several cases: but in all those cases it will be found that the persons rated were the occupiers of lands within the place, in respect of which the tolls in the whole or in part were payable. In the King *v.* Cardington the party was rated, for the sluice was real property. In the case of canal tolls, the proprietors rated were the occupiers of the canals; and canals are real property: they are land applied to a particular purpose, and the tolls are the profits arising from that use of the land, and are to the proprietors as a compensation for the use of it in that manner. Here the appellant was not an inhabitant of Monkwearmouth-shore, and he was not an occupier there of any real property, for which he was rateable.—Order of Sessions quashed.

illiams *v.* ones.

Williams *v.* Jones, 12 East, 346.

The plaintiff brought a writ of error to reverse a judgment given against her testator in the court of Great Session of Anglesey, in an action of trespass by Hugh Williams, the plaintiff's testator, against Jones and Hughes, for taking his ferry-boat on the 2d of June, 1806, at Beaumaris in the county of Anglesey, and selling the same, and converting the money arising therefrom to their own use. The defendants pleaded not guilty, and also two several justifications; the substance of which was, that the supposed trespass was done by them in executing a warrant of distress duly issued after summons, &c. by two justices of the peace for the county of Anglesey, against the said Hugh Williams for non-payment by him of a rate made for the relief of the poor of the parish of Llandysilio in the said county, in which rate he was assessed as proprietor and occupier of Porthaethwy ferry in that parish, in the sum of 10l. 13s.; and the payment of which was first duly demanded of and refused by him. The plaintiffs below replied that the defendants of their own wrong, and without the cause by them alleged, committed the trespass complained of; and on issue joined, a special verdict was found, stating in substance;

Williams *v.* Jones.

Non resident pr prietor not rateable for ferry tolls.

That Hugh Williams was the proprietor of Porthaethwy ferry, and of the tolls thereof; the same being an ancient ferry for the conveyance of persons, cattle, and carriages, in boats across an arm of the sea, called the straits of Menai, or the river Menai, from the county of Carnarvon to the county of Anglesey, and vice versâ: and the King's highway from London to Holyhead leads to and from the said arm of the sea, within the limits of the ferry. For many years past there have been and

Williams v. Jones.

now are five landing places in the parish of Llandysilio in Anglesey, used by the ferry-boats on landing from the opposite shore; which landing places have within four years before the making of the rate in question been repaired and improved by Mr. Williams, the proprietor of the ferry; and for divers years last past there hath been and now is a post fixed in the ground at one of the landing-places, to which post the ferry-boats have been and are usually moored when lying on the Anglesey side. The said arm of the sea is open at one end to the bay of Carnarvon, and at the other end to the Irish sea, and is navigable to all the King's subjects; and they have always of right landed at the several landing-places at their pleasure, and the proprietor of the ferry never had nor hath the sole or exclusive use of the said landing-places, or either of them; but has the sole and exclusive right and privilege of conveying by his boats persons, cattle, and cariages, for hire, from a part of the said King's highway lying in the parish of Bangor, in the county of Carnarvon, to another part of the said King's highway, lying in the parish of Llandysilio, in Anglesey, and vice versâ. During all the time aforesaid the ferry-boats have been worked and navigated by the proprietor's servants, hired and paid by the day; and the tolls and hire due and payable for such conveyance from the county of Carnarvon to the county of Anglesey, have in fact paid to his servants for the use of the proprietor of the ferry, sometimes upon the said arm of the sea, a little before the arrival of the boats at the landing-places, and sometimes in the boats at the landing-places, and at other times upon the landing-places in the parish of Llandysilio after the persons paying the same have landed. And the proprietor's servants have from time to time paid over the tolls and hire so received by them to his agent, residing in part of a dwelling-house, whereof Hugh Williams is seized in fee, in the parish of Llandysilio, of which house one T. B. is tenant and has continually been rated in his own name to the relief of the poor of the said parish of Llandysilio, and has paid the rates assessed upon him. And Hugh Williams' agent has never been rated, nor ever paid any poor rates; and such agent has from time to time, monthly, paid over such tolls and hire to another agent of Hugh Williams, at Beaumaris, in Anglesey, out of the parish of Llandysilio, for the use of H. Williams. H. Williams never inhabited or dwelt in the parish of Llandysilio, and no proprietor of the ferry or tolls or other person in respect thereof, has at any time been rated for the same to the relief of the poor of the parish of Llandysilio before the making of the rate in question. The special verdict then stated that Hugh Williams being such proprietor of the ferry, before the trespass complained of, a rate for the relief of the poor of the parish of Llandysilio was duly made, dated the 6th of Feb. 1806, in which he was rated for Porthaethwy ferry and the tolls thereof, at the sum of 10l. 13s.; which rate was afterwards duly allowed by two justices of the peace for the county of Anglesey, and duly published in the parish church of Llandysilio; and payment was afterwards duly demanded of Mr. Williams by the defendants

ants the parish officers of Llandysilio; but he refused to pay the same. And then it stated the complaint of the parish officers to two magistrates of the county; the summons issued to Mr. Williams to answer before the magistrates; his default; and the due issuing of the warrant of distress, by virtue of which the defendant distrained one of Mr. Williams' boats for the amount of the rate, &c. But whether upon the whole matter the defendants of their own wrong, and without the cause alledged by them in their justificatory plea, committed the trespass, the jurors prayed the advice of the court, and found a verdict of guilty or not guilty accordingly. The court below gave judgment for the defendants; and the plaintiff below having in the mean time died, his executrix brought this writ of error.

This case was argued in the last term by Abbott for the plaintiff, and by Barnes for the defendant. The general arguments urged by them for and against the rateability of this species of property have, to avoid repetition, been interwoven with those urged by the counsel in the last case, which was decided immediately before this. Some additional observation was made in this case upon the circumstance of the post driven into the soil, to which the ferry boats were sometimes made fast on the Llandysilio-shore; but the court considered that this did not essentially vary the present question: for the owner of the ferry was not found to have any property in the soil of the highway; and supposing that he had a right to make such a special use of the highway for the purpose of securing the ferry boats, that did not make him the occupier of the highway; nor give him any exclusive possession of it; nor could he maintain tresspass for any injury done to the soil at the landing-places, which were common to all the King's subjects to land and pass upon. And now, after the judgment in the former case had been delivered.

Williams v. Jones.

Lord Ellenborough, C. J. declared the opinion of the court, that the decision of this case necessarily followed that of the other, the question in both being substantially the same; and therefore they reversed the judgment of the court below. Judgment reversed.

Rex *v.* Eyre, 12 East, 416.

Lessee of bridge tolls not rateable.

The defendant appealed to the Borough sessions of Tewkesbury, against a poor rate, wherein he was assessed as "lessee of the tolls of "the Key Bridge" at Tewkesbury, at 350l. per ann. The Sessions confirmed the rate, upon the general principle, as they stated, that the rent *bonâ fide* paid by the occupier, is the best criterion by which to judge of the value of property; but subject to the opinion of this court upon the following case:

By the stat. 48 Geo. 3. c. 62.; certain trustees are appointed for rebuilding the Key Bridge across the river Avon, in the borough of Tewkesbury in Gloucestershire, and for making convenient roads thereto. The act enacts that out of the first monies arising from the tolls to be collected by virtue of the act, or out of the first money which should be borrowed upon the credit thereof, the trustees shall in the first place pay the expences of passing the act, and repay all sums advanced thereon, with interest, and

Rex v. Eyre.

also all expences in making the plans and estimates of the bridge: "And that after payment thereof, "all the money which should come "to the hands of the trustees or "their treasurer, for the purposes "of the act, should from time to "time be applied in erecting the "turnpikes or toll-houses, and in "making the temporary bridge, "and erecting the new bridge, and "keeping the same in repair, and "opening and making proper ap-"proaches thereto, and in defray-"ing all other necessary charges "and expences attending the execu-"tion of the act, and in paying "the interest of the principal "money so to be borrowed, and in "otherwise carrying this act into "execution; and to and for no other "use, intent, or purpose whatso-"ever." "That as soon as the se-"veral purposes of the act should "be carried into execution, and the "principal and interest borrowed "and secured thereon should be re-"paid, all the tolls thereby imposed "should absolutely cease, and "the new bridge and the ap-"proaches leading thereto, should "thereafter be repaired by such per-"sons as were by law liable to re-"pair the same." The trustees, being empowered by another claim to lease the tolls, under the clauses and stipulations therein expressed, have leased the same to the appellant, at the annual rent of 350l. It has been the usual custom of the parish to make their rates upon the pound rent; but it was not proved that the appellant made any profit on the said tolls, nor that such tolls left any residue after payment of the said yearly rent of 350l.; on the contrary, it is believed that the present lessee has a most unprofitable taking, and that he will not even clear his present rent.

The court, after observing upon the loose and imperfect manner in which the case was drawn up; in not stating either that the lessee was the occupier of any toll-house or dwelling-house within the parish which was the proper subject matter of a rate; or that he was an inhabitant of the parish, in the sense which had been lately put by the court on that word in the statute 43 Eliz. c. 2; and in not finding the fact whether the lessee did receive any profit to himself from the tolls, beyond the rent which was applicable to public purposes, but merely stating that it was believed that he did not; were inclined to have sent the case back to the Sessions to be restated in a more perfect manner. But it being suggested in opposition to the rate, that it would not answer any purpose to send the case back, all the facts having been stated which were capable of proof on the part of those who supported the rate; and that the only question meant to be raised by them was, Whether the tolls of a public bridge were rateable in the hands of a lessee? Lord Ellenborough, C. J. said that as the court had so recently decided that tolls *per se* were not rateable; and that as the appellant was rated merely as lessee of the tolls, and for nothing else, which might have given them a corporeal quality within the parish, such as for a sluice or the like; and that as it did not appear that he was an inhabitant of the parish, or made any profit of the tolls; there was nothing stated in the case to raise any question. And that though it should turn out to be fact (which

But if tolls are connected with real and substantial property, it has been already observed that they may be rated conjunctively with that property if situated within the parish, which yields profit there by means of the tolls. (1)

(which was suggested from the bar) that there was a toll-house attached to the bridge where the appellant dwelt: yet as the sending the case back to Sessions to be restated, would probably only lead to their inserting as a fact what at present they had only stated as matter of belief, that the lessee derived no profit to himself from the tolls; it was better for all parties to quash this rate; and if at any future time the parish thought they could make out a better case against the lessee, they might rate him again. *Per curiam*, Order of Sessions confirming the rate quashed.

(1) The King *v.* Sir A. Macdonald and others, 12 East, 324.

Tolls rateable with lock, &c.

This was an appeal against a poor's rate made for the township of Manchester, which was confirmed by the sessions on appeal, subject to the opinion of this court on the following case.

The property in respect of which the appeal was made, was described in the assessment as follows.

Premises.	*Assessment.* £. s. d.	*Poor's Rate.* £. s. d.
Rochdale canal lock, tunnel, dues or rates	562 10 0	140 12 6
Warehouse and wharf, bottom of Castlefield	525 0 0	131 5 0
Staffordshire warehouse	262 10 0	65 12 6
Warehouse on Manchester side of Knott Mill	375 0 0	93 15 0
Coal wharf from Staffordshire warehouse to Knott Mill	90 0 0	22 10 0
Wharf adjoining Knott Mill	45 0 0	11 5 0
	1860 0 0	465 0 0

The appellants were not at the time of making the assessment, inhabitants of Manchester, but were then and still are entitled to and in the receipt of tonnage, in respect of vessels passing through the lock built upon the Rochdale canal, under an act of the 34th Geo. 3. the 2d section of which, reciting that "Whereas Francis Duke of Bridgwater hath expended a considerable sum in making wharfs, for the convenience of the public, adjoining or near to his canal at Manchester, and when the proposed junction is made with his canal the profits arising from those wharfs will be considerably diminished; nevertheless he consents to such junction on being authorized to build a lock upon the Rochdale canal near the junction,

Canal tolls, when rateable.

It is scarcely necessary to remark, that the decisions apply to all cases of tolls whether they accrue in respect

"tion, and to collect certain rates "hereinafter mentioned, as a com- "pensation for such diminution in "the profits of his wharfage;" authorizes the Duke, his heirs and assigns, "at his and their own ex- "pense, to build a proper lock upon "the said Rochdale canal, at or "near Castlefield, &c. and all ne- "cessary works thereto belonging; "and to take at the said lock for "his and their own benefit, (as a "compensation for the diminution "in the profits of his wharfage as "aforesaid,) the following rates, "viz." (and then gives certain rates per ton for goods carried and navigated from the Rochdale canal into the canal belonging to the Duke, and vice versâ); "which rates shall "be payable and paid at or near "the said lock to the said Duke, "his heirs and assigns, and shall be "collected by such person as the "said Duke, &c. shall by writing, "&c. appoint to receive the same." The lock was built in pursuance of the act. The tonnage amounts to as much as it is charged at in the assessment. The appellants, at the time of making the assessment, were and still are in the occupation of the lock and of the several warehouses and wharfs mentioned therein; and the same are of the value assessed. The proprietors of the Rochdale canal company are not rated for their locks upon the said canal situated within the township, or for the tonnage, tolls, duties, or rates, arising from such locks or otherwise from the said canal within Manchester; this being provided for by the stat. 47 Geo. 3., entitled 'An Act to alter and amend the several Acts for making and maintaining the Rochdale canal navigation.'

Lord Ellenborough, C. J. The court will not involve themselves in any contradiction to the cases which have been decided, by discharging the rule for quashing the order of Sessions in this case, on the rateability of the property of the trustees. The case states that they are the occupiers of the lock and of the several wharfs and warehouses mentioned in the rate; and it is not disputed that the property rated yields profit: but it is objected that they are rated for *dues* or *rates*, that is, for the tolls payable at the lock under the act of parliament; and that the court have held tolls not to be rateable. But the court have only said that tolls are not rateable per se, but only when connected and rated conjunctively with real and substantial property, situated in the parish, which, as yielding profit there by means of the tolls, is the proper subject of rating within the act of Elizabeth. Now here the lock itself is rated, which is something real and substantial, locally situated in the township, and producing profit; and the addition of the dues or rates is merely giving other names for the same things. These dues or rates are given by the act of parliament

spect of markets, navigable canals, sluices, bridges, or ferries. But it is material to observe, that in the case of canal tolls, the Judges appear to consider the canals as real property, being land applied to a particular purpose, and the tolls as profits arising from this use of the canal; so that the proprietors seem rateable as occupiers of canals. (1)

ment as a compensation to the Duke of Bridgewater for the loss of his profits of certain wharfs adjoining to his canal at Manchester, which wharfs were before clearly rateable in respect of those profits; the rates, therefore, made payable at the lock were substituted as a compensation for and in lieu of the wharfage before enjoyed: they are the substituted medium of profit arising, as the act describes it, from these wharfs. The Court, therefore, by this decision, will not break in upon that which they have recently decided, that tolls per se, and when not mixed with a rate upon other property, which, as having substance and locally within the parish, is properly rateable there, are not liable to be rated.

The other Judges concurring,

The rate and order of Sessions confirmed.

(1) Per Le Blanc and Bayley, Js. Rex *v.* Nicholson, ante. 107. See also Rex *v.* Aire and Calder Navigation, ante, 97. Rex *v* Page, ante, 98. and the opinions of Lord Kenyon, C. J. and Lawrence and Le Blanc, Js. Rex *v.* Staffordshire Canal, ante.

It seems now settled that tolls and other incorporeal hereditaments are not rateable unless the possessor resides in the rated district, or occupies some local visible real property there, which is connected with such profits. The author has neither the wish nor the presumption to aim at disturbing a construction which the learned Judges have put upon the statute by so many, and such recent decisions. But as he expressed it as his opinion, in former editions of this work, that this kind of property was rateable *per se*, he trusts it will form some apology for a short statement of the reasons upon which that opinion is founded.

The 43 Eliz. directs that the taxation shall be "according to the ability of the same parish." It seemed clear that *incorporeal hereditaments*, or more correctly speaking, *incorporeal tenements*, constituted part of that ability, and consequently if the statute had stopped without any further description, the parish officers must have assessed all persons in actual possession of this kind of property. They could have made no distinction in fact, as there was none in justice, between the proprietor of the tolls of a market or fair, who had a right to piccage and stallage as owner of the soil; and a proprietor of tolls entitled to no other use of the land than what was essential to the enjoyment of his franchise: or, between the owner of a several fishery entitled to the bed of the river, and the possessor of an exclusive right of fishing in water flowing over land, of which the barren and unprofitable seisin was vested in another. Ingenuity could not

not have raised a distinction between the owner of tolls arising from a canal who had no further interest in the soil than a right of passage, and an owner also entitled to the land itself; and it must have been less allowable, if possible, to make any difference in the rateability, because one proprietor landed his goods at a wharf in his own possession, and the other delivered them at one occupied by another, while the soil of the canal was vested in neither. In these and many other cases the duty of the individual to contribute arising from his ability, is equal; and if the quantum of profit be equal, that ability must be equal also. But the statute proceeds to specify two descriptions "of persons in "whom it supposes the ability of "the parish to rest, and upon whom "it on that account directs the rate "to be made;"—1. "Every inhabi-"tant, parson, vicar, and other;" and 2d, "Every occupier of lands, "houses, tithes impropriate, propria-"tions of tithes, coal mines, or sale-"able underwoods in the said pa-"rish." It must be allowed on the one hand, that if these words can admit of such an interpretation as brings the entire ability of the parish into contribution, it should be adopted in furtherance of the avowed object of the statute. On the other hand it must be conceded, that if the words do not fairly admit of that construction, a court of law is bound to reject it, without regard to the result, however inequitable or injurious.

It was conceived that possessors of these species of property might be included under the term "*inhabitant*," although resident elsewhere; because Lord Coke, in his comment upon the statute of bridges, 2 Inst. 702., lays it down, that under that description, all possessors of real property are assessable in the place where such property is situate, although they do not reside there. This opinion has been recognized as law by subsequent authorities, and in particular Lord Kenyon, C.J. relies upon it in commenting upon 43 Eliz. c. 2., 3 Term Rep. 523. That great judge gives it as his opinion in another case, that the "legislature intended that where "rates are made for the relief of "the poor, *every person* should con-"tribute according to the benefit "which he receives within the pa-"rish," Rex *v.* Carlyon, 3 Term Rep. 385.; and in another case he lays it down, that the general object of the act was to "compel *all those* "*who had any property* in the parish, "to contribute their due propor-"tion to the maintenance of the "poor," Rex *v.* Clapp, 3 Term Rep. 107.

But the argument against the rateability is, that the possessor is not within the words of the 43 Eliz. 1. He is not rateable as an *inhabitant*, because that signifies in this act, "a "person *resident* in the parish," for "in a statute which mentions inha-"bitant as well as occupier, inhabi-"tant must mean resident, otherwise "it would for this purpose mean the "same as occupier."—2. He is not rateable as *occupier*, because tolls and property of that description do not come within any one specification of occupancy described by the statute, and the Judges have in many cases doubted whether such property lies in occupancy at all.

1. With respect to the argument upon the meaning of "inhabitant;" it

it is humbly conceived that it assumes the point in dispute: for if *inhabitants* may comprehend possessors of real property, which "*occupiers*," coupled as it is in the statute, cannot; those words are not of necessity placed in opposition to each other, as being otherwise tautologous. The question therefore continues open, whether "*occupiers*," &c. include all non-residents to whom the rate must be confined in exclusion of others of equal ability, or whether it amounts to no more than a partial enumeration by way of instance and instruction to parish officers who are to administer the act. (1)

It was apprehended that the meaning of the terms "*inhabitant*" and "*occupier*," should be collected as well from their application in corresponding parts of the statute, and a general view of its provisions and purport, as from the consideration of the sentence itself. It was doubted whether "inhabitants" could be considered as confined to *inhabitant residents*, because every parson of a parish is made rateable by the statute under that description. But if a resident is alone rateable as an *inhabitant*, a clergyman would under that construction be exempt from a rate for tithes and oblations, not only where he is excused from residence by 21 H. 8. c. 13. but in every township of his parish excepting those in which his parsonage and glebe are situate, where the poor are maintained by townships under 13 and 14 C. 2. This construction was considered as being strengthened by reference to sect. 3. of the statute; which provides a rate in aid of such parishes as are unable to maintain their own poor. That section applies the word inhabitant, and no other, to comprehend all persons liable to be rated both in the parish requiring aid, and in that by which it is to be given. It seemed impossible then that the words in that section "*inhabitants* of any parish" could be considered as signifying "residents" in opposition to "*occupiers*," for unless it includes both; occupiers of real property will be excused from a rate in aid, if they do not reside in the parish required to contribute. This interpretation was relied upon as being supported and sanctioned by great authority. Rex. *v.* Tunstall and Happing, 3 Term Rep. 523. Lord Kenyon thus expressed himself: "Great stress has "been laid on the proviso in 20 G. 3. "which has the words *inhabitants and* "*occupiers*. Now the statute 43 Eliz. "uses the word inhabitants which

(1) The clause is considered as descriptive rather than enumerative, because the preceding words of the section "every inhabitant, parson, vicar, and other," seem so intended. As the pronoun has no correllative but *inhabitant*, it follows that the clergy are enumerated as instances of inhabitants; and this conclusion seems more plausible from the remaining part of the clause specifying all tithes in lay occupation, and omitting those in the hands of the clergy. Any other construction would solve the difficulty; for if "other" does not refer to "inhabitant," it must refer to a description of persons not before mentioned, and mean any other person having ability in the parish, not being an inhabitant, parson, or vicar.

"HAS BEEN HELD NOT TO BE CONFINED TO RESIDENTS. And Lord "Coke in his reading on the 22 H. 8. "c. 5. relative to the repairing of "bridges by the inhabitants of coun- "ties, says, that the word inhabitant "includes those who occupy land in "the county though they do not re- "side there. For some purposes *in-* "*habitants* and *occupiers* are synony- "mous terms. When a person de- "rives a benefit from property which "he occupies in the parish he is lia- "ble to contribute to the ease of it. "And in Rex *v.* Clapp we observed "that this was one of the modes by "which he was to contribute to the "ease of the parish. If indeed the "legislature had added the word "*resients* to *inhabitants* in the act of "parliament, that would have con- "fined this burthen to persons actu- "ally residing within the parish."

2. The writer had likewise conceived that if a non-resident possessor could not be deemed rateable as an inhabitant, he became so under the 2d branch of the statute as being an occupier of real property within the parish. He had considered it to be received as settled law, that the descriptions of property mentioned in the act were put by way of example, and not as an enumeration of those classes to which the rate upon non-residents must be confined. See *ante*. And the specification of *houses*, which are clearly comprehended under the legal signification of land, appeared to strengthen that opinion which had been taken from preceding authorities.

Upon the more difficult question, whether such property was capable of occupation, so as to rank the possessor under the description of a rateable occupier, great doubts must be entertained where so many and such great judges have differed in opinion. But it seemed that the term occupancy admitted of two distinct meanings both in common language and legal acceptation: the first referred to the means of acquisition, or title; the second respected the mere possession. In the former sense all incorporeal tenements and hereditaments are incapable of being occupied; and the rule applies to tithes as well as tolls, rents, and franchises. Lord C. J. Vaughan, in his elaborate argument upon the right of occupancy, Holden *v.* Smallbrooke, states, "There can be no "primary and immediate occupancy "of a tithe, for if it is not in its own "nature capable of occupancy more "than a rent or common is, and is "in fact in its nature but a rent, it "cannot pass by itself but by deed "and as other things which lie in "grant." Vaugh. 191. But the term occupant has been likewise used in the books to signify possession of an incorporeal hereditament where a qualification is subjoined to denote the means of acquirement. Thus it was held so long ago as 18 Ed. 3. that there might be a special occupant of a rent. 18 Ed. 3. 44. &c. 33 Assiss. 4. and this description has been since adopted in subsequent cases. Whiskens *v.* Davies, 2 Roll. Abr. 151. Low *v.* Burdon, 3 P. Wms. 334. It seemed therefore, if the word could receive that meaning at all, that it should be adopted as being in furtherance of the purpose of a statute which laid the rate upon mere possession, without reference to the title, or regard to the question whether it could be defended by ejectment, assize, or trespass. This interpretation appeared more natu-

SECT. III.

Tithes.

Tithes.

THE next species of property mentioned in the statute is "tithes impropriate," and "propriations of tithes." These kinds of tithes usually exist in vicarages, but sometimes eleswhere. They are generally the great tithes severed from the benefice, and due to some other person than the vicar. They originated from the practice of annexing benefices to a spiritual corporation, either sole or aggregate, which was considered as the perpetual parson of the living (1). This corporation provided a clergyman to officiate in its room, to whom the vicarial tithes were assigned for subsistence; and the benefice. with the remaining tithes, were appropriated to its own use. The latter share is what is called in the statute "propriations," or more correctly "appropriations of tithes." Advowsons, amounting to more than one-third of all the parishes in England, got into the possession of religious houses during the times of popery, by these means. Upon the suppression of monasteries, the 27 H. 8. c. 28. and 31 H. 8. c. 13. gave their benefices to the King, to hold as they held them. Many of them were afterwards granted to the subject; and as they are called *appropriations* while they continue in spiritual hands, they are called *impropriations* in those of the laity; and tithes payable to these lay impropriators, are called "*tithes impropriate.*" (2)

1. Appropriate.

1. Impropriate.

ral because the possessor of appropriate and impropriate tithes was called the *occupier* in the statute, when at least in Lord C. J. Vaughan's opinion such incorporeal hereditaments are incapable of occupancy in the other, and possibly the more correct application of the word, and the term is so used by the court in Rex *v.* Lambeth, 1 Str. 525. as also in other cases.

(1) 1 Black. Com. 384. Grendon *v.* Underwood, Plowd. 496. Terms de la Ley, voc. Impropriation; and Cowel's Law Dict.

(2) Sir H. Spelman of Tithes, ch. 29. Cow. Dict. voc. Impropriation.

Tithes

5. Property of the clergy.

Tithes in the hands of the efficient incumbent, whether parson or vicar, are not expressly mentioned in the statute. But as it directs that the "parson or vicar" shall be taxed, it must intend that it shall be for that property which constitutes the chief subject of their occupancy (1); tithes being deemed a tenement by our law.

4. Tithes rectorial and vicarial.

Not only parsonage houses and glebe lands are rateable in the hands of the occupier (2), but both rectorial and vicarial tithes have been always deemed so, whether due by common law (3), or by custom. Such are the tithes of fish caught in the sea; for the legislature intended, that when rates were made, every person should contribute according to the benefit which he received within the parish, and this is a certain annual profit received within the parish without any risk run. (4)

5. A modus.

A modus, or other composition paid in lieu of tithes, is equally liable to this tax. Thus where by an inclosure act, an allotment of common field land was made to the rector in lieu of the tithes issuing out of the old inclosures in the parish; and it was provided, that when the owners of such inclosures had none, or not sufficient land in the common field to make such allotment, they should pay

(1) For the propriety of applying this term to tithes, see Rex *v.* Lambeth, 1 Str. 525. also the opinion of Parker, C. J. Rex *v.* Turner, post. n. 2.

(2) Rex *v.* Turner, 1 Const. 126. Pl. 158. Per Lord Kenyon, Rex *v.* Catt. 6 Term Rep. 332.

(3) The parson or vicar presentative shall bear according to the reasonable value of his parsonage, having consideration to just deductions, 33 resol. Judg. 1633. Dalt. 237. Per Hale, C. J. Rex *v.* —— 3 Keb. 255. Rex *v.* Turner, ut supra. Rex *v.* Skingle, 1 Str. 100.

(4) Rex *v.* Carlyon, 3 Term Rep. 385. The question made, respected, a rate upon the lay impropriator's tithe of pilchards; but the vicar was also rated for his share, and no objection made. As to when fish is tithe-able or otherwise, see Gould *v.* Arthur 1 Roll. Abr. 636. Pl. 7. Anon. Cro. Car. 264. lb. 234. Anon. Het. 1). Guavas *v.* Kelynac. Bunb. 256. 3 Com. Dig. tit. Dismes, (H. 13.) (H. 163 Williams *v.* Baron, 3 Wood's Decr. 130. 3 Gwillim on Tithes, 931.

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an annual sum to the rector, with power for him to distrain in case of non-payment, and sell the distress in such manner as landlords are by law authorised to distrain for rent. This being a sum of money payable in lieu of the tithes of the old inclosures, is liable to be rated as the tithes themselves previously were. It is not a rent but a composition for tithes, and the superadding a power of distress does not turn it into a rent, but rather proves the contrary (1). So also a rate or assessment directed by statute to be made in lieu of all tithes and other ecclesiastical dues, is rateable, unless exempted by express provision (2), as are likewise oblations or other offerings which constitute the rectorial or vicarial dues (3), and even a pension payable to the parson. (4)

6. Other ecclesiastical dues.

SECT. IV.

Mines and other Fossil Productions.

THE next species of property mentioned in the statute are coal mines. These are rateable by the express words of the act (5). The particular use to which the produce of a coal mine is applied, by the owner of the lands, does not exempt it from this tax. Thus, if the coal is used for smelting the ore of his iron mine, the coal is rateable, although the ore is not. For, there is no difference whether it is thus applied by the owner, or sold by him to another, who uses it in an iron foundery (6). But it

(1) Lowndes *v.* Horne, 2 Black. 1252.

(2) Rex *v.* Toms, Doug. 401. Rann. *v.* Picking, Cald. 196. and see Rex *v.* Topham, 12 East, 546.

(3) Per Lord Kenyon. Rex *v.* Carlyon, ut supra, 126. n. (2).

(4) Per Nares, J. Lowndes *v.* Horne, 2 Bl. Rep. 1252. cites Powell *v.* Bull. Lord King's MSS. Mic. Term, 4 Geo. I.

(5) Rex *v.* Parrot, 5 Term Rep. 593.

(6) Rex *v.* Cunningham, and others, 5 East, 478. Mich. 45 Geo. III. Under what circumstances it is rateable as to beneficial occupation, see Rex *v.* Parrot, 5 Term Rep. 593. Rex *v.* Bidworth, 8 East, 387. post.

has

has been held, that as other mines were known in the country when the statute passed, the mention of this inferior species of mine amounts to a tacit exemption or exclusion of all others, such as lead, tin, copper, iron mines (1), or any other but coal mines. The reasons assigned for this are, "that they are not within the "letter of the statute, and if the legislature had meant "to include them, they would either have enumerated "them, or used the word mines [or some equivalent expression or other, as mineral works, in 31 Eliz. c. 7.] "so that the word coal mines expressly excludes mines "of any other sort as much as if they had been ex- "cepted. They are liable to more hazard and expence, "and are governed by particular laws; the worker of "them is not always the owner of the soil; a local law "gives the right of working under certain regulations "and conditions to other persons than owners or lessors, "or persons having any right of property in them." It is also said, "that there is an infinite expence and anxi- "ety in finding lead mines, and the finder is obliged to "pay certain proportions to the owner of the land; and "there is a much greater risk in the search after them, "even so much as that a man may be ruined by it in- "stead of succeeding." (2)

Metal mines not rateable.

It has been already shewn, that the owners of duties arising out of metallic mines, such as the lot and cope of lead mines (3), the toll and farm tin of tin mines (4), are rateable when they are paid clear of deduction, and freed from the hazards of working.

(1) Rex *v.* Richard Cunningham, Mich. 45 Geo. III. where upon a question, whether an iron mine was rateable, the court held it not to be so, and that the case was too clear to admit of argument, 5 East, 478.

(2) The Smelting Company *v.* Richardson, 3 Burr. 1341, 1 Bott 127. Pl. 164. Per Lawrence, J. 2 East, 167.

(3) Rowlls *v.* Gells, Cowp. 451. 1 Bott, 146. Pl. 174.

(4) Rex *v.* St. Agnes, 3 Term Rep. 480. 1 Bott, 192. Pl. 197.

Neither

Neither does the exception extend beyond mines properly so called. Lime-works are not comprehended within it, but their profits are rateable in the hands of the occupier, although uncertain in their amount, owing to the expence and risk of working. (1)

Lime works rateable.

Upon the same principle, the occupier of a slate quarry is held rateable, though the quarter sessions stated in the case, that the working of such quarries is a thing of great expence and risk, and is always considered as a matter of uncertainty and speculation, and that the "slate *mines*" had never been rated before. For the word "mine having slipped in at the end of the case, "cannot alter the nature of the thing, which is no mine "in the proper sense of the word; and if every sub- "stance which is raised from under the surface of the "soil is to be considered as the produce of a mine, and "therefore that the profits of it are not rateable, the "exception will equally extend to gravel, sand, marle, "stone and the like, none of which were ever considered "as the produce of mines." (2)

Slate works.

Further it was held to be so clear as not to endure discussion, that claypits worked (for the purpose of getting potter's clay) at considerable expence, and with considerable, though fluctuating profit, are rateable. (3)

Why mines and casual profits exempted.

Some of the reasons assigned by the court for not rating other mines, seem to favour the conclusion, not only that the legislature by the expression of one species of mine designed to exclude the remainder by reason of their peculiar laws, but that it was never intended to rate mere casual profits of a similar nature, from whatever subject they arise. (4)

(1) Rex *v.* Alberbury, 1 East, 534. Per Lord Mansfield, arg. Atkins. *v* Davis, Cald. 338.

(2) Rex *v.* Woodland, 2 East, 164.

(3) Rex *v.* Thomas Brown, Trin. Term, 47 G. 3. 8. East, 528.

(4) See the opinions of the judges, Rex *v.* Baptist Mill Company, 1 Maule and Selw. ante, 86.

The 43 Elizabeth enacts, that the rates shall be made for short periods, and manifestly refers to the profits which accrue according to the common course of affairs during that time. It purports to raise at all times the necessary funds upon the usual income of the parish. It makes the rate prospective, so that the former return of profit must constitute the foundation of the ensuing assessment. This cannot be unless the amount admits of an average certainty, which is not to be affected by an irregular swell from casual profits, or diminution by subsequent losses.

It is further observable, that the statute does not tax capital, but the produce of capital. If a man builds a house, the occupier is rateable for its yearly value as soon after it is built as it is occupied (1); for the amount of the capital exists in the house itself, and the annual produce of that capital is the fair subject of rate. But where a shaft is sunk for a metal mine, the capital is in the first instance consumed; it rises again only in the ore. To rate the entire ore, deducting the expence of raising the specific quantity, would be to rate the capital itself, instead of its produce; and the uncertainty attending such works, renders it doubtful whether the profits will ever repay the expence. The whole property is in constant hazard, and its value may alternately sink or rise beyond the costs of the adventure, just as the buckets do by which the mineral is raised. The adventurer would be taxed for a year of profit, but he could have no allowance for a losing year, although it might draw the former profit back again into the mine, and sink much additional capital with it.

There is a great distinction also between the uncertain amount of profit; and the uncertainty of profit altogether which is attended with risk of capital. Every object of

(1) Per Willes, J. Atkins v. Davis, Cald. 333.

human

human care and culture is subject to the first. Uncertainty in the amount, while the capital or direct subject of the tax is permanent, forms no grounds for a general exemption from the rate, although it may for particular abatements proportioned to the diminution of profit. But uncertainty of profit puts the capital in hazard, and is a matter of speculation and chance. If any thing is derived from the risk, it is not properly an occupier's profit, at least of an occupier for that short period which the statute has in contemplation. It may be said indeed, that both are uncertain, and that the loss of profit on a farm may ultimately diminish the actual capital employed, as it does in a copper mine. But the probable risk of capital is the characteristic of the latter undertaking, and the ground of distinction.

Coal mines are of a mixed character: the working is attended with a degree of certainty, and therefore the mine itself may be considered as the capital, and the coals at the pit's mouth as its return. The principle explained here seems to be that which is meant by what the books call a "permanent value" (1). The recent decisions of the rateability of lime and slate works, do not overturn it (2). These are not mines in any sense of the word, and although the working may be attended with hazard, it is only as to the amount of the return, but not of a considerable capital.

SECT. V.

Saleable Underwoods.

THE 43 Eliz. points at these principles more manifestly by the last species of property, which it mentions as

(1) Per Lord Loughborough, Atkins *v.* Davis, Cald. 337, 338. And see the opinion of Lord Mansfield, Rowls *v.* Gell, Cowp. 451. 1 Bott, 146. Pl. 174.; and of Ashhurst, J. Atkins *v.* Davis, Cald. 330. Rex *v.* Baptist Mill Company, 1 Maule and Selw. ante, 86.

(2) But what is said by Buller, J. Atkins *v.* Davis, Cald. 325. is contra. Rex *v.* Richard Cunningham, Mich. 45 G. 3. ante, 127. (6).

rateable in the hand of the occupier, viz. *Saleable Underwoods.* Woods, consisting of what is called great wood or timber trees, of 20 years growth and upwards, are exempt from contributing to the poor, as they are freed from tithes (1). For they are not the profits of the occupier considered as such, but parcel of the inheritance itself. (2)

Saleable underwoods, what?

The court of king's bench have by a solemn judgment determined, that by "saleable underwoods" the legislature meant "underwoods intended or destined for "sale, in contra-distinction to such as are to supply "the landlord with estovers for fuel, and the other pur- "poses of the estate;" and that they are not to be rated for that year only when a periodical profit can be fairly and seasonably made of them; but that "they are at all "times rateable," according to the improvement in their value, or in the rent which might fairly be expected from them (3). And the mode in which woods are managed for

(1) Com. Dig. Tit. Dismes (H. 3.) 1 Gwillim, 15, 16. Walton *v.* Tryon, 2 Gwill. 827.

(2) Herlakenden's case, 4 Rep. 62. a. Robert Liford's case, 11 Rep. 466.: and see other authorities, 2 Com. Dig. tit. Biens (H.)

(3) Rex *v.* Mirfield, 10 East, 219. Lord Ellenborough, C. J. The owners of this kind of property are in the habit of cutting certain proportions of it every year: but where the extent of it is too small to adopt this course, there may be a difficulty in rating it annually. There is great difficulty however on the other hand, in attaining any thing like equality by adopting a different mode of rating: for if the property is only to be rated when it is cut once in 21 years; instead of contributing its quota of the rate equally through the whole period, it throws a glut into the fund in that one year, and is barren all the rest of the period, and if the owner has other property in the parish, he will pay so much less for that in the same year when his ability is increased. However as it is a case of extensive consequence, we will consider further of it. Near the end of the term His Lordship delivered the opinion of the court.

"This was an appeal against a poor's rate for the parish of Mirfield, in which the appellant, Henry Beaumont Esq., was rated for some underwoods. The underwoods were such as are usually cut down once in 21 years, and in the year they are cut they produce profit, but in other years they are stated as producing none. At the time of the rate they were 10 years standing. The sessions thought

for timber and underwood are different, so that the manner of treating it, is evidence of the class in which it is

thought they were not rateable, and therefore quashed the rate; but submitted the question to this court, whether they were liable to be rated every year, according to the annual average value thereof; or whether they should be rated then only when they are cut down and produce actual profit. Among the several descriptions of persons whom the stature 43 Eliz. c. 2. makes rateable, the occupier of saleable underwoods is one: and the question is, whether they can be deemed saleable underwoods, except in the year in which they are cut down. The word saleable has not a very precise, definite meaning; it may mean when they are in a fit state for sale, referring to the time when they are cut; or it may mean such as are intended or destined for sale, in contradiction to such as are to supply the land with estovers for fuel and the other purposes of the estate. In the former of these cases they would only be rateable in the year in which they are cut: in the latter, they would be rateable at all times; and we think, after full consideration of the subject, that the latter is the proper meaning. If they are rateable at all times, they will contribute, according to their value, in exact proportion with the rest of the property in the parish: but if they are rateable in that year only in which they are cut, the sum they will have to contribute may materially vary according to the proportion their value bears in that year to the rateable property of the rest of the parish, and may be much greater or much less than the aggregate sum it would pay if it were rateable at all times. Suppose the underwoods in the year they are cut would produce a clear 1000l.; that the sum to be raised in the parish, communibus annis, is 100l.; and that the value of the rest of the property in the parish is 980l.; if the underwoods be rated at 20l. a year, which may be the rent they would produce upon a 21 years lease, the rates would amount to 2s. in the pound, and the underwoods would contribute annually 40s. If they were rated only in the year they were cut, a shilling rate would then be sufficient, and they would contribute rather more than 50l. So far there would be no injustice; but suppose the rest of the parish to be worth 10,000l., the underwood would, supposing them as before to be rated at 20l., contribute annually about 4s.; whereas if rated in the year of cutting, they would contribute in the proportion which 1000l. bears to 10,000l., that is the 11th part of the whole rate of 100l. which in money is 9l. and a fraction. As 50l. then is only 25 times 40s. and 9l. is 45 times 4s., the disproportion in the two cases put is obvious, and the difference to all parties, whether the rate be annual, or in the year only, considerable. Again, suppose the annual value of the parish 6000l., and the annual sum to be raised still 100l., the rates will be 4d. in

is to be placed, so as to be considered as liable or exempt from assessment. When woods are managed as underwood, all the small wood is cut down at certain periods, leaving standing trees at certain distances. Wherever woods are intended for timber, the larger trees are cut down and the smaller wood is left. (1)

the pound, and the underwoods will pay annually 6s. 8d. upon their same supposed annual value of 20l., whereas if they paid in the cutting year only, they would pay 14l. 5s. 8d. which is above 42 times 6s. 8d. Put the annual value of the parish at 500l.; the rates to raise 100l. must be 4s. in the pound; but, in the cutting year, they would only be 1s. 4d. The underwoods would contribute in ordinary years, upon the last mentioned assumption of the annual value of the rateable property in the parish, 4l. annually; whereas in the cutting year they would contribute little less than 20 times that sum, viz. 75l. It is hardly necessary to state that a mode of rating which might produce such differences to the owner of this description of property, and to the parish, if he contributed only in the cutting year, cannot be the true rule; and the only other rule is a constant contribution, which will at all times fall equally upon this and every other species of property. The objection to this, in argument, is, that the property ought not to be rated until the produce of it has been severed from the land, and until it has supplied the occupier with the means of paying. But we are of opinion that it is not necessary that any of the profits should have been actually reaped or taken from the property during the period for which the rate is made; but that the property is at all times rateable according to the improvement in its value, or in the rent which might fairly be expected from it. Instances continually occur in which the occupier is rated though he has derived no profit, during the period for which the rate is made. A new tenant upon an arable farm reaps none of the produce till the autumn after his tenancy commenced, and yet he must pay up to that autumn according to the rent or value of the estate. He must pay before hand for the future probable produce. His farm is constantly in a progressive state towards producing profit; and he pays for that progress. So underwoods are annually improving in value, and the rates the occupier pays are for that improvement. This may possibly be hard upon tenants for life; but if the laws have thrown this burthen upon the property, they take it with that burthen. We think, for the reasons we have mentioned, that the law has so thrown it; that the property is at all times liable to be rated whenever rates are made; and consequently that the order of sessions ought to be quashed, and the rate confirmed."

(1) Aubrey *v.* Fisher, 10 East, 449.

This exemption of wood is not confined to trees coming within the strict legal description of timber, such as oak, ash, and elm; it is sufficient if the trees in question are deemed so by the custom of a particular district. Thus woodlands, the trees growing thereon consisting chiefly of *beech*, and some oak and ash trees, there being no coppice wood, and the underwood being left to grow as standards, were held not rateable, *beech* being found by the sessions to be *timber*, by the custom of that particular part of the country (1). And it retains the privilege, although it be put to the uses of underwood, being cut and made up in parcels for firing. (2) Timber by custom.

Also when beech or any other particular wood has been determined to be timber by the custom of the country, it is to be taken to be timber according to the rules of the common law respecting timber in general; and therefore an issue whether timber or not? will only let in the enquiry as to the particular species of wood; and no evidence can be received to shew, that though of 20 years growth it is not by such custom accounted timber, and consequently continues rateable, unless the tree contains 10 feet of solid wood. (3)

(1) Rex *v.* Minchin-Hampton, 3 Burr, 136. Aubrey *v.* Fisher, 10 East, 446. See also Lapthorne's case, 1 Roll. Rep. 355. 2 Roll. Abr. 814. 1 Inst. 53. a. So as to tithes, Wright *v.* Powle, 1 Gwillim, 357.; and if it be accounted timber by the custom of the particular parish where it grows, that is sufficient, for it needs not be so throughout the country. Per Lord Mansfield, Rex *v.* Minchin-Hampton. Per Lord Hardwicke in the case of tithes, Walton *v.* Tryon, 2 Gwill. 833.

(2) Ibid. Also where the tree is a timber tree either by common law, or by the custom of the country, it is free from tithes both as to the body, lops, and tops. Per Lord Hardwicke, C. Walton *v.* Tryon, 2 Gwill. 832. But Greenway *v.* Earl of Kent, Bunb. 98. is contra.

(3) Aubrey *v.* Fisher, 10 East, 446.

CHAPTER VII.

Of Property exempted by particular Statutes. (1)

THE principles already detailed respect real property, as it is affected by the 43 Eliz. c. 2. They seem to extend to all property of this kind, however modified by subsequent statutes, unless their operation is controlled by positive enactment. Thus by a private statute 9 & 10 W. III. c. 37. for erecting workhouses in Colchester, the poor are directed to be provided for in a particular manner, to the intent no other levy or assessment be made for the poor of the town, and the occupiers of lands and tenements are made chargeable, but no mention is made of tithes in this private statute. Yet they were held rateable; for being liable by 43 Eliz. c. 2. they could not be exempted but by express words, and an occupier of tithes is an occupier of a *tenement*, which word is mentioned in the act. (2)

But particular things, which would be liable to the tax under 43 Eliz. may claim exemption by subsequent statutes, and in some instances, they have been considered as exonerated by general words.

Thus, where houses and lands given to charitable uses, were by a private act (3) declared "*freed, discharged, and* "*acquitted of and from the payment of all and every manner* "*of taxes, charges, and assessments, civil and military what-*

(1) See Rex *v.* Dock Company of Hull, ante, 74. Kemp *v.* Spence, ante. Lowndes *v.* Horne, ante, 126. (3) Rann *v.* Picking, ante, 127. (1) are likewise cases which embrace the construction of private statutes.

(2) Rex *v.* Skingle, 1 Stra. 100.

(3) 12 Car. 2. confirmed and perpetuated by 13 Car. 2.

"*soever*,

"*soever, hereafter to be laid, &c.*" and that the occupiers shall not at any time hereafter be rated, &c. *for or towards any manner of public tax, assessment, or charge, whatsoever*, they were held exempt from the poor's rate, it being considered *a public tax*, or levy of the parish, within 3 W. & M. c. 11. s. 6. (1) So where 7 Geo. III. c. 3. enacted, that *lands* to be enclosed and embanked from the Thames, shall vest in the owner, &c. *free from all taxes and assessments whatever:* houses erected upon this ground, are not liable to the poor's rate, for this act being subsequent to 43 Eliz. c. 2., and the lands themselves being exempted thereby, so must also the houses built thereon. (2)

St. Michael's, Coventry.

Likewise, where by 19 Geo. III. c. 60., the parish officers of the parish of St. Michael's, in Coventry, are to raise yearly by a pound rate, any sum not exceeding 300l. nor less than 280l., and to pay the same to the vicar, by equal quarterly payments, "clear of all taxes, deductions, charges, and extras whatever, *parochial*, parliamentary, or otherwise howsoever;" which said sum is to be in full satisfaction of all the vicar's claims under the act; and is "in lieu and full discharge of all ancient "payments, Easter offerings, *tithes*, and other ecclesiasti-"cal dues, claims, and demands whatsoever, except "surplice fees." This salary is not liable to the poor's tax. (3)

Liverpool canal.

By 10 Geo. 3. the incorporated company of the proprietors of the canal navigation from Leeds to Liverpool are enabled to make a navigable canal, and take a certain sum per mile, for the tonnage and wharfage of goods

(1) Rex *v.* Scott, 3 Term Rep. 602.

(2) Eddington *v.* Borman, 4 Term Rep. Williams *v.* Pritchard. Ib. 195. Pl. 199.

(3) Rex *v.* Toms, Doug. 401.

navigated

navigated thereon, and so in proportion for any greater or less quantity. It is also enacted, "that the said tolls, rates and duties, should at all times thereafter *be exempt from the payment of any taxes, rates, assessments, or impositions whatsoever*, any law or statute to the contrary notwithstanding, *other than such taxes, rates, and assessments, as the land which should be used for the purpose of the said navigation would have been subject to, if this act had not been made.*" The meaning of this exemption is, that the company shall not be liable to any other taxes than those which the land they make use of in their undertaking was previously subject to. As the land, therefore, was not before liable to be rated for tolls, the proprietors shall not be liable to a poor's rate or tolls in respect of it, when converted into a canal. (1)

The land will be rated in the same manner as it was before the act. (2)

Another part of the canal is exempted altogether from assessment for tolls, by 20 Geo. 3. (3)

Stonehouse Bridge.

A case was sent up from the court of quarter sessions in Devonshire, concerning the validity of a poor rate. The statute 7 Geo. III. for building *Stonehouse bridge* by s. 19. exempted it from "the land tax or any other public or parochial rate or tax whatsoever;" and by s. 20. provided, that certain persons, and their heirs, should stand seised of the tolls of the bridge, "to the same uses, trusts, and estates, and subject to the same wills, settlements, limitations, remainders, *charges*, tenures, rents, and incumbrances," as the ferry was, in lieu of which the bridge was erected; and held, that the word *charges* only extended to private charges on the estate. (4)

(1) Rex v. The Leeds and Liverpool Canal Company, 5 East, 323.
(2) Per Le Blanc, J. Ibid.
(3) Ib.
(4) Case of Stonehouse Bridge, 5 East, 356. n. a.

The

The London Dock Company upon the construction of 39 & 40 Geo. 3. c. 47. were held liable to be rated in the poor's rate, during the first twelve years of their establishment for the fair annual value of their warehouses and other works which are finished, and productive, though all the works directed by the act be not completed. But such completed works must under these circumstances be rated for their value at 8½d. in the pound, that being the rate calculated upon in the act, to raise 139l. 8s. 7d. per quarter, upon 3966l. which was the average rental for ten years preceding the act of the premises destroyed by the company in making their works; and which quarterly sum the company were at all events bound to pay to the parish during the 12 years, or until the works were completed, whether those works were productive or not. But when productive beyond that sum, the surplus [rate] is to be taken in the first instance by the company in order to reimburse such sums as they advanced to the parish to make good the difference [between the sum of 139l. 8s. 7d. which they paid, and what a rate upon their property as it became productive would have produced] before any productive surplus existed, until the company should be reimbursed such deficiency. Therefore until these purposes are effected, a rate on the increased real value, at more than 8½d. in the pound, or a rate at 8½d. in the pound on 39l. 6s. 6d. the old average value of the premises, and below the increased value of the new works, is bad. (1) London Dock Company.

At a sessions holden for the city and county of Norwich, Ann Sutcliffe appealed against an assessment of 100l. stock, charged upon her for the relief of the poor. It appeared by the case, stated for the opinion of the court St. John's Madder-market. Money in funds.

(1) Rex *v.* St. George Middlesex, 9 East, 127. The clauses of the act not being set forth in the report, the marginal abstract is inserted here.

of

of king's bench, that the appellant was assessed for 100l. stock, or personal property, charged upon her by a rate for raising 137l. 11s. 10d. for maintaining the poor, made by virtue of a local statute of the 10th of Anne, for erecting a workhouse in Norwich, for the better employment and maintaining the poor there; under which act, the churchwardens and overseers of the poor of the said parish, were, according to the directions and words of the said act of parliament, authorized and required "to rate and assess the said sum (of 137l. 11s. 10d.) on the inhabitants, and on every parson and vicar, and on all and every the occupiers of lands, houses, tenements, tithes impropriate, appropriations of tithes, and on all persons having and using stocks and personal estates in the said parish (of St. John's Maddermarket), *or having money out at interest*, in equal proportion, as near as may be, according to their several and respective values and estates." And, on hearing the said appeal, it appeared to the said court, that ever since the passing said statute, lands, houses, tenements, stocks, and personal estates, within the said city and county, and money out at interest, as well without as within the said city and county, of the respective inhabitants within the several parishes of the same, have been constantly assessed to the poor's rates, according to the circumstances of such inhabitants. That the appellant had not any stock or personal estate in the said parish of St. John's Maddermarket, or in any other parish or hamlet within the said city and county of Norwich, *nor had any money out at interest* on real or personal security; but that she was possessed of money *vested in the public funds*, or on government security, and then standing in her name in the books of the governor and company of the bank of England in the 5 *per cent.* bank annuities: and, therefore, the appellant admitted, that the said assessment was just, if the said last-mentioned money was liable to be rated. The court of quarter-sessions

being of opinion, that money vested in the public funds, or on government security, was not by virtue of the aforesaid act liable to be rated to the relief of the poor, allowed the appeal. The court of king's bench were of opinion, that government stock was not money out at interest, within the meaning of this local statute, and therefore not taxable under it; and also, that it was not taxable under the 43 of Eliz. not being local visible property within the parish. (1)

(1) Rex *v.* St. John's Maddermarket in Norwich. Hil. 45 G. 3. But according to the report of Rex *v.* Clerkenwell, Foley, 15. it appears to be taken for granted, that personal estate in the public funds is liable to be assessed to the poor-rate.

CHAPTER VIII.

Of the Rateability of Personal Property.

Of parochial ability.

THE statute makes no specific mention of any other kind of property than those which are treated of in the foregoing chapters. But as it requires that the several inhabitants should be taxed according to the ability of the parish, it renders them liable to the extent of that ability, however constituted (1). The pecuniary funds, or ability of the inhabitants, when referred to their sources, are divisible into three kinds: 1st, What arises from real property. 2d, What arises from capital stock, or as it is here called, personal property. And,

Personal labour exempt.

3d, The produce of personal labour, or in other words, "what arises from the ingenuity of a man's head, or the "work of his hands (2)." The resolutions of the judges already cited, by deciding that the tax is upon the person in respect of his local and visible, real and personal property (3), excluded the produce of personal labour, as a direct object of assessment. Their opinion seems to have been framed upon the system of taxation by subsidy, which was in use at that time. A subsidy being a tax not immediately imposed upon property, but upon persons in respect of their estates (4), "which was to be "levied of every subject of his lands or goods, after the

(1) Lord Kenyon expresses it thus: "The legislature intended that when "rates are made for the relief of the "poor, every person should contribute "according to the benefit which he "receives in the parish." Rex *v.* Carlyon, 3 Term Rep. 385. See also Rex *v.* Jones, 8 East, 425.

(2) Per Willis, J. Atkins *v.* Davis, Cald. 334., and Buller, J. Rex *v.* Hogg, Ib. 275.

(3) Per Lawrence, J. Rex *v.* St. John's, Maddermarket, 6 East, 182. ante.

(4) 1 Black. Comm. 310.

"rate

" rate of 4s. in the pound for lands, and 2s. and 8d. for " goods; and for aliens, for goods, double." (1)

Lord Mansfield was of opinion, that the words of the 43 Eliz. considered merely of themselves, would bear a more extended construction than has been given to them, if they had not been explained and narrowed by usage. " The words of the statute," said he, " are very " loose and very general, and they may be construed in- " to any latitude; even to make all a man has, and all a " man gets in any way, the measure of his ability: for " truly and substantially it is so; but usage has ex- " plained it and narrowed it. I know nothing of any " usage that says, a man shall pay according to his abi- " lity, in the obvious common sense of the word, *i. e.* all " he gets or makes by his efforts or abilities. If this were " the rule, every profession would be liable to be taxed " for all they get upon an average." If we don't find it there (*i. e.* in the usage), " I know nothing in the words " of the statute to prevent taxation being carried to that " extent." (2)

Sir Anthony Earby's case is reported in the ninth year of Charles I. and the resolution of all the judges, upon which it is founded, was some time previous. Nothing entitled to the name of usage could have sprung up between the 43 of Eliz. and the date of the report (3); and this opinion of the learned judges, to which he leaned with peculiar predilection (4), has been overruled. (5)

(1) 4 Inst. 33. See also Rastall's Abridg. tit. Taxes, Tenths, Fifteenths, Subsidies, &c. There is however, this difference established at least by subsequent determinations: that in a subsidy, the tax was imposed on the supposed value of the goods; in a poor rate, it is laid upon the profit which they yield.

(2) Atkins *v.* Davis, Cald. 336.

(3) See also case of St. Leonard's, Shoreditch, 2 Salk. 483.

(4) See 1 Bott. 132. Pl. 168. Ib. 155. Pl. 178. Ib. 162. Pl. 183.

(5) Ib. 151. Pl. 176. Ib. 208. Pl. 205, &c. Cald. 315, 326.

But

But his opinion, that the profits of personal labour are not rateable *eo nomine*, or at the moment in which they are made, is confirmed by several decided cases. (1)

Salaries not rateable.

Thus the fees of a physician or lawyer are not made liable by the act, and therefore cannot be rated (2); an officer in the salt office (3); or in the customs (4); a captain in the navy, or merchant's service (5); and a clerk to a merchant (6), have been held not rateable for their respective salaries (7); nor an attorney for the profits of his profession (8); nor a silk throwster for the profit he makes by cleaning and throwing his employer's silk (9); for it would be to tax labour, and not pecuniary ability.

Personal property rateable.

As it was unusual to assess personal property for near two centuries subsequent to the statute, the court felt considerable reluctance to decide upon its rateability, not withstanding Sir Anthony Earby's case. Such an universal agreement to omit, was considered as strong evidence to shew the impossibility of rating it. But it was at length held to be clearly rateable for its profits where they can be ascertained, and a mandamus was granted to compel the justices to assess it (10). A clothier, therefore (11), a draper or shopkeeper (12), and a merchant (13), are rateable for their stock in trade; a butcher for

Stock in trade, ships, &c.

(1) Per Buller, J. Rex *v.* Hogg, Cald. 275. Per Lord Mansfield, Rex. *v.* Andover, Cowp. 550.

(2) Per Lord Mansfield, C. J. Governor and Co. for smelting Lead *v.* Richardson, 3 Burr. 1341. 1 Black. Rep. 349. Rex *v.* Shalfleet, post.

(3) Rex *v.* Shalfleet, Const. 138, Pl. 71. 2 Burr 2011. S. C.

(4) Rex *v.* White, 4 Term Rep. 771.

(5) Ibid.

(6) Ibid.

(7) Rex *v.* White, 4 Term Rep. 771.

(8) Rex *v.* Startifant, 7 Term Rep. 60.

(9) Rex *v.* Sherborne, Trin. 47 G. III. 8 East, 537.

(10) Rex *v.* Canterbury, 1 Bott, 132. Pl. 167. Rex *v.* Whitney, Ib. 134. Pl. 170. and in Rex *v.* Barking, it was decided that a tradesman was rateable for his stock in trade. 2 Ld. Raym. 1280.

(11) Rex *v.* Hill, Cowp. 613.

(12) Rex *v.* Andover, Cowp. 550.

(13) Rex *v.* Mast, 6 Term Rep. 154.

capital

capital employed in his business (1). The owners of ships are, when resident, rateable to that parish in which the ships lie, if the port is their home (2). In one case the court seemed of opinion, that the stock in trade of a brewer was not rateable (3); but this was before the general question respecting the rateability of personal property was determined; the decision turned upon another point, and as there is no principle upon which it is to be distinguished from any other stock in trade yielding profit, it has since been decided to be rateable. (4)

Profits of labour when rateable.

Though the profits of labour are not immediately rateable, yet, when the produce has accumulated, and is vested in property that is liable, it is of course to be assessed; for the court cannot go into the enquiry whether such profits were the profits of a trade or a profession, or how they were acquired; the question whether rateable or not, must depend upon the form that has been given them, *the thing that visibly exists.* Thus, fishermen are not rateable for the fish caught; but if they pay tithes to the clergyman, whose profit is certain, and who runs no risk, these tithes have assumed a new shape, and are, as has been already observed rateable under the statute. (5)

(1) Rex *v.* Rodd, Cald. 147.

(2) Rex *v.* White, ut supra. S. P. in the case of the packet boats carrying the mails and passengers between Holyhead and Dublin. For the possession of such a vessel within the parish by an inhabitant actualy residing there and making profit of it, constitutes so much of his local ability to contribute to the maintenance of the poor of the parish. Rex *v.* Jones, Trin. 47G. III. 8 East, 452.

(3) Rex *v.* Ringwood, Cowp. 326.

(4) Rex *v.* Mast. 6 Term Rep. 154. Rex *v.* Ambleside, Mich. 53G.3. 16 East.

(5) See Rex *v.* Mast. 6 Term Rep. 154. Per Buller, J. Rex *v.* Hogg, Cald. 275. Rex *v.* Carlyon, 3 Term Rep. 385. Upon this principle it may happen that property which is exempt from being the specific subject of rate by 43 Eliz. such as timber when severed, the ore of lead-mines, &c. may become liable to assessment where it is part of the local visible personal ability of an inhabitant. See the observations of Lord Mansfield, C. J. The Smelting Company *v.* Richardson, 3 Burr. 1321. Rex *v.* Shalfleet, ante, 144. (3).

Of rateable property which is doubtful, whether to be classed as real or personal.

A difficulty, however, remains behind, even where the subject of the rate is clearly rateable. If the proprietor does not reside in the parish, it becomes necessary to decide upon the class of property under which the thing sought to be taxed should be ranked, in order to ascertain whether it can be rated at all (1). Also if he does reside, most parishes have confined themselves to rating real property, and the judges seem inclined to approve their conduct (2). Where this mode is followed, it becomes necessary to determine, whether a particular subject is real or personal property, in order to decide whether it shall be assessed with the first, or stand exempt where the second is exempted. Further, where personal property is rated, the assessment upon real and personal estate is subject to very different deductions, and therefore the particular nature of each subject assessed must be ascertained, in order to settle the deduction that is to be made from it. (3)

Reasons for this distinction.

The court of king's bench will not entertain this question, unless expressly stated for their opinion. They decide, whether the property set forth in the case is in its nature rateable; but without reference to the fact, whether property of the same species, in the hands of other persons, is included in the rate, for that relates merely to the quantum of the assessment, which the sessions, acting in the nature of a jury, are more competent to determine. (4)

(1) Ante, chap. vi. Rex *v.* Liverpool. 8 East, 455. (d). Rex *v.* Collinson, Ib. 457. Rex *v.* Howard, Ib. 458. The opinion of Lawrence, J. Rex *v.* Jones, Ib. 458. post.

(2) Rex *v.* Canterbury, 4 Burr. 2290. Rex *v.* Whitney, 1 Const. 141. Pl. 176. 5 Burr. 2634. 2 Black. Rep. 709. S. C. Rex *v.* Ringwood, Cowp. 326. 1 Bott, 144. Pl. 173.

(3) See post. chap. xii.

(4) Rex *v.* Hogg, 1 Term Rep. 721. As to how far the court feel themselves concluded by the statement of the case, respecting the rateability of personal property, see post. chap. ix. sect. 3.

CHAPTER IX.

Of the Rateable Occupier of real Property.

SECT. I.

Of the Occupation.

1. It must be occupied.

THE thing rated must be actually occupied, not only because the statute in cases of real property directs the tax to be laid upon the occupier; but because otherwise it yields no profit to lay the rate upon. Thus, if an house be untenanted, and kept shut up without being put to any use, it is not rateable.

Occupier rated.

In strictness the rate should be imposed upon the occupier, and no other person; who regularly should be named in the rate (1); if laid upon the landlord instead of those who are in possession, it is bad (2), even though he has covenanted with the tenant to pay the tax for him. (3)

Occupier, who?

In examining the subject it is necessary to consider under what circumstances a person becomes a rateable occupier; for if no person can be found to answer that description, no rate can be made. (4)

(1) Per Lord Mansfield, Rex *v.* St. Luke's, post. (2)

(2) Milward *v.* Caffin, 2 Black. 1333. Rex *v.* Southwark, 2 Str. 745. Per Lord Mansfield, C. J. Rex *v.* St. Luke's, 2 Burr. 1053. Rex *v.* Gardner, Cowp. 79. Per Lord Kenyon, C. J. Rex *v.* Parrot, 5 Term Rep. 513. Per Eyre, C. J. Lord Bute *v.* Grindall, 1 Term Rep. 338. 2 H. Black. 267. Per Buller, J. Rex *v.* Llangamarch, 2 Term Rep. 628. But no person, unless he can shew himself damnified thereby, except the person who ought to be rated, can take advantage of this objection. See Rex *v.* Thomas Brown, Trin. 47 G. III. 8. East, 538.

(3) A rate on the occupier was held good under these circumstances. Rex *v.* Hogg, Cald. 274, 1 Term Rep. 271.

(4) Per Lord Alvanly. In Holford *v.* Copeland. 3 Bos. & Pull. 141.

Occupation of houses, &c.

With respect to the mere fact of occupying corporeal hereditaments, the possessor need not be in the habit of using every part of the house to render him liable to an assessment for the whole. Where a gentleman purchased a house of the value of 24l. a year, the keys of the house always remained in his custody, and frequently, for amusement, he used a throw or lathe, and other turning instruments in one of the rooms; he had a table and three chairs there, and now and then a fire, but no other household furniture in the house; he kept corn for his horse in another room, and occupied the garden, keeping a gardener to take care of that and another garden, who sometimes put his flower pots, shrubs, &c. and some of his working tools into another part of the dwelling house; where lumber belonging to him was also put by his servants; but no person ever slept or lodged in the dwelling house, except a poor person whom he permitted to live rent-free in the kitchen, the communication being stopped up between it and the remainder of the house. The court were of opinion, that he occupied the whole house, and was properly rated for the whole. (1)

A surgeon of militia was occasionally absent from home and left an assistant in part of his house, his wife and daughter also being absent; and the assistant had only the use of the shop, the remainder of the house being completely parted from it. The garden was taken care of by a person paid by the appellant and his furniture continued in its usual situation in all the rooms ready for the family's reception during the whole time, and the person with whom the key was left, permitted a friend of the appellant's and her servants to reside there for two months while the family was away. He was held rateable as being the occupier of the whole house during the period of his absence. (2)

(1) Rex *v.* St. Mary the Less, 4 Term Rep. 477.

(2) Rex *v.* Aberystwith, 10 East, 354.

It

It was found that the mayor, aldermen, and burgesses of a borough, were the owners of a large tract of land within the borough, used as a common of pasture, and stocked by the resident burgesses, in right of their burgherships, according to a stint annually fixed by the leet jury, who are burgesses of the borough, under the control of the mayor for the time being. That of the resident burgesses, who have rights of common, some stock to the full of their rights, others partially, and some not at all, and that those who do not stock receive an annual payment of 19s. 4d. from those who do. It was held, upon this statement, that this is not properly a right of common; and that the corporation are the owners in fee, but not the occupiers of the land; and the burgesses who turn out stock are the occupiers, as tenants in common, who may each maintain trespass for an injury done to his occupation in common, and who are rateable for it to the poor. (1)

Burgesses stocking a common.

In this case each of the burgesses was in possession of a distinct interest, and their respective portions were ascertained, and the corporation would not take in the cattle of a stranger. These circumstances distinguished it materially from the following determination.

The 48 Geo. 3. vested the aftermath of a large meadow in trustees, in trust for the burgesses, and principal householders of Tewksbury, freed from all other interest in the same, with power to let the whole or any part or parts annually for the best rent, and also to let it in pastures for horses, cattle, and sheep, to different persons, at such rates, and subject to such regulations as the trustees should appoint, or by writing under their hands and seals to demise the same for a term of years, &c.;

(1) Rex *v.* James Watson, Mich. G. III. 5 East, 480. See also Rex *v.* Aberavon, 5 East, 453.

and that the rents and profits should, after payment of all charges, be divided by the trustees among the objects of the trust. The trustees not being able to let this aftermath together for its value, let it out in pastures at a certain sum per head, for horses, cattle, and sheep, to various persons who enjoyed the same by turning their cattle out, and the trustees did not occupy it unless such letting and enjoyment in pursuance thereof amounted to an occupation by them. The court were of opinion, that as the letting was at so much a head, without any definite time, and the persons whose cattle were taken in had no definite portion of the aftermath let to them, and as the trustees were not bound to limit the number of cattle, they were to be deemed the occupiers, and were properly rated as such. (1)

Of incorporeal hereditaments.

When the thing is from its nature incapable of bodily possession, as in the case of incorporeal hereditaments, such as tolls, the receipt of the profits is the occupancy, which subjects the party to the rate. (2)

Therefore the herbage and pannage of a park belonging to the ranger, which is (as we have seen) a right or privilege to take by his beasts and swine, the surplusage of the feed and mast, over and above a sufficient pasture and feeding of the game, is not rateable when he does not put cattle and swine in to take it; because they yield no profit, by the taking of which the right can be alone occupied (3). It would seem also, that where the ran-

(1) Rex *v.* Trustees for the Burgesses, &c. of Tewksbury, 13 East, 155.

(2) In the case of tolls, it is not he who pays, but he who receives the tolls that is rated. Per Buller, J. Rex *v.* Jolliffe, 2 Term Rep. 90. See ante, 120.

(3) Lord Bute *v.* Grindall, 1 Term Rep. 338. It is not settled whether herbage and pannage are rateable at all, the judges having differed upon that question. Jones *v.* Maunsell, Doug. 302. 1 Bott, 157. Pl. 181, ante. But the judges, both in B. R. and the Exchequer Chamber, were clear that it should not be rated on the above ground.

ger

ger is entitled to put beasts upon a certain part of the land in the king's park laid open to the park pasture, that he is not liable to be rated for it if he has not received any profit at all from thence. But upon this point, the judges gave no opinion. (1)

Tithes, who occupiers.

Where the parson lets his tithes to the tenant of the land from whom they are due, it seems that the former is to be considered as the occupier, and rated to the poor as such. For it has been observed, that the letting is but an agreement with the tenant of the land to retain the tithes, and he is to be considered either as a person who buys them, or as one excused from paying any, and the clergyman continues occupier in point of law. When the parson or his farmer receives a sum of money in lieu of tithe, that is in law a receipt of the tithe, with this only difference, that it is not tithe in kind. In the case of a composition, as this is, or a modus, it was never thought but that the parson was occupier of the tithe, there being no colour to charge the tenant of the land. (2)

Also if one farms the parson's tithes, and agrees by parol with the tenant of the land that in consideration of his paying so much, he shall retain the tithes for the year (3), and gather in the whole crop without dividing, this is not an underlease of a thing which lies only in a grant, and the tithe farmer is the occupier to be rated, and not the parson or tenant of the land. (4)

The occupation must be absolute.

In order to constitute a rateable occupier, it is necessary not only that the person should have possession, but

(1) See 150. n. (3).

(2) Rex *v.* Bartlett, 17 Vin. Abr. 427. [Rex *v.* Lambeth, Stra. 524. Per Parker, C. J. Rex *v.* Turner, 1 Const. 126. Pl. 158. This seems to relate to parol agreements from year to year without formal grant.

(3) See case of Lambeth as reported Cas. Sett. & Rem. 104. Pl. 140.

(4) Rex *v.* Lambeth, ante, (2).

that he should have such a control and dominion over the subject, as implies freedom from any paramount occupation, or direct interference by a superior with his domestic arrangements and internal management; such as a farmer enjoys over his farm, and the master of a family over his house. Although, therefore, if a tenement be divided by a partition, and inhabited by different families, the owner in one and a stranger in another, these are several tenements, and severally rateable (1). Yet no lodger, though possessing the principal part of the house, was ever rated; but the owner, how small soever the part reserved for himself, is in the eye of the law the tenant for the whole, and is rated as the occupier. (2)

Therefore a laundress is not rateable.

If a gentleman, having a coach-house or a laundry at a small distance from the mansion-house, permits the coachman to live in one, and the laundress in the other, they are not to be considered as occupiers of these tenements, so as to be rated for them (3). So a woman who covenanted with the Philanthropic Society to become their servant in the capacity of matron or mistress to superintend the children, at annual wages, to take apprentices and instruct them; and to have a dwelling free from taxes, with certain other perquisites: she had no distinct apartment in the house provided by the society, except a bed-chamber, and her family were not allowed to live there; and she was liable to be dismissed at a month's notice, or an allowance of three months' wages instead thereof. She is a mere servant in the house, and as such is not liable to be rated as occupier (4). Also a person put into a free-school merely to look after the pupils, and who does not occupy the house, is not rateable for it (5). Upon the same principle, servants at-

Nor the housekeeper of the Philanthropic Society.

(1) Per Holt, C. J. Tracey *v.* Talbot, Salk. 531.

(2) Per Buller, J. Rex *v.* Eyles, Cald. 414. See also Rex *v.* Watson, 5 East, 480.

(3) Per Lord Kenyon, Rex *v.* Field, 5 Term Rep. 587.

(4) Rex *v.* Field, ante, n. (3).

(5) Per Lord Kenyon, C. J. Rex *v.* Catt. post.

tending an hospital for the reception of lunatics, much less the poor wretches who are the objects of the charity, are not such occupiers as are intended by the statute. (1)

Neither are the prisoners in the Fleet Prison considered as such, although they pay a weekly rent to the warden (2). Nor are the soldiers living in a barrack. (3)

Nor prisoners in the Fleet, no soldiers.

Upon the same principle a poor person permitted to live rent free in the kitchen, the communication between which and the remainder of the house was stopped up, does not prevent the owner from being rateable as occupier of the entire house. (4)

Person living rent free in kitchen.

So also a servant at an annual salary, who residing in two rooms within the walls of the light-house to take care of the lights, his master being proprietor of the tolls can not be rated for these as the occupier; it is the occupation of his master. (5)

But where the head of the family possesses this right of control, he is to be considered as occupier, although he stands in the relative situation of servant to his landlord in other respects. Therefore a keeper of the king's park, appointed by the ranger to continue during pleasure, and occupying a lodge and two acres of land within the parish, in right of his appointment, is subject to the rate; for he occupies an house and two acres of land, and whether he pay for them by rent or by service, can make no difference as to his being rated. (6)

But if the occupation is complete, the occupier is rateable, though a servant; as a keeper in the king's park for his house, &c.

(1) Rex *v.* St. Luke's Hospital, 2 Burr. 1053.

(2) Rex *v.* Eyles, Cald. 407. Rex *v.* Donnovan, 2 Black. Rep. 682. Cases in Crown Law, 67.

(3) Per Lord Kenyon, Lord Amherst *v.* Lord Somers, 2 Term Rep. 372. Rex *v.* Hurdis, 3 Term Rep. 497. Eckersall *v.* Briggs, 4 Term Rep. 6. Rex *v.* Terrott, 3 East, 506.

(4) Rex *v.* St. Mary's the Less. 1 Const. 206. Pl. 203. ante, 148.

(5) Rex *v.* Tynemouth, 12 East, 46.

(6) Rex *v.* Matthews, Cald. 1. Rex *v.* Hurdis, ante, n. (3). Jones *v.* Maunsell, Doug. 302.

Where-

Officers of Chelsea Hospital for their apartments.

Where the comptroller of Chelsea hospital, or officers of that or other charitable foundations, have large distinct apartments appropriated to the use of their respective offices, where they and their families reside, they are to be charged not as servants of such hospitals, or as inhabitants and occupiers of the ordinary rooms and lodgings, but as having separate and distinct apartments, which are considered as their dwelling-houses. (1)

College porter, &c.

So the porter and butler of a college are rateable for their dwelling-houses erected for them by and belonging to the college, if they have the entire use of them without the college's intermeddling therewith. (2)

Joint occupiers.

But a distinction is to be taken between possession, subject to the control of a superior, and a joint enjoyment of an undivided property, where all must be considered as rateable occupiers. (3)

A further difference arises also between subordinate possession and a special occupation, the latter being liable to assessment.

Special occupation.

An occupation may be considered as special, when one person occupies so far as to receive immediately some particular profits, for which no other person is rateable as occupier, although he has to a certain extent possession of the subject from which they issue for other purposes.

Thus the warden of the Fleet is rateable for that part of the prison which he lets out in rooms to his prisoners at a weekly rent, although the rooms are in the prisoners' actual possession (4). The corporation of London was held rateable for the tolls of the barge way, of which the herbage and pannage was demised to a lessee who was

(1) Ayre *v.* Smallpiece, 1b. 126. 1b. 192.

(2) Rex *v.* Gardner, Cowp. 81.

(3) Rex *v.* Munday, 1 East, 584. Rex *v.* Watson, 5 East, 41.

(4) Rex *v.* Eyles, Cald. 407.

rated

rated for them (1). The lessee of the lot and cope of a lead mine is liable, although the mine itself is in the possession of those who work it, and who are not subject to the tax (2). As is also the proprietor of the dues called toll and farm tin (3). The lessee of lot, toll, and free-share of calamine (4). So the ranger of a park is assessable for his share of the profits of the land; yet the crown, who permits a sort of community of possession as to the usufruct is exempt from assessment. (5)

But if the tenant sells his whole crop standing, he is rateable notwithstanding as the occupier of the land (6). So if he sells underwood he is to be assessed, and not the vender who grubs them up. (7)

Of distinct occupation.

The cases which have been already alluded to (8) shew, that it is not every species of distinct occupation which is in the nature of a sub-tenantcy, that should in policy and convenience be made the subject of a distinct assessment, although it might be so assessed, if the parish officers should deem it expedient, or the parties rated should prefer it. Thus the occupier of a farm, who is possessed of considerable meadows, may sometimes underlet them in small portions to tenants to take the crop, or he may let the aftermath to different persons in joint tenancy, or a gentleman may demise part of the produce of his garden to certain persons. But great inconvenience and injury would arise not only to the person occupying land in this way, but to the parish, if these tenements should be assessed distinctly, instead of comprehending the whole in one entire rate upon the principal occupier

(1) Rex *v.* Mayor of London, 4 Term Rep. 21.

(2) Rowls *v.* Gells, Cowp. 451.

(3) Rex *v.* St. Agnes, 3 Term Rep. 480.

(4) Rex *v.* Baptist Mill Company, ante, 86. (1).

(5) Lord Bute *v.* Grindall, 1 Term Rep. 338. 2 Hen. Black. 267.

(6) Rex *v.* Lambeth, 1 Str. 525.

(7) Ibid. and see ante, 152. and the cases there cited.

(8) Ante, 152. et seq.

of

of the premises (1). Upon this principle the court seemed of opinion that a dairy-man who rented a farmer's cows, under

(1) Per Cur. Rex *v.* Thomas Brown, Trin. 47 G. III. 8 East, 528.

The occupiers of several farms who are rated to the poor for their respective farms, let their cows to an undertenant called a dairy-man, at a certain rent per cow, which cows, by the agreement, are exclusively depastured on different grounds belonging to the occupier of the farm at different times of the year; he being obliged to feed and maintain them without any expence to the dairy-man. The dairy-man makes a profit of such cows independently of the profit made by the tenant of the farm.

Lord Ellenborough, C. J. "The appellant complains of the rate without shewing any grievance; because the farmer having been rated as we must presume for the full profits of the farm, it matters not to the appellant whether or not the rate in respect of that farm could have been better distributed by laying one portion of it on the farmer and another on the dairy-man; the appellant's proportion of the rate would remain the same in either case. It is said that the interest which the dairy-man takes under such an agreement is a tenement in law, and gives him an interest in the land, by which he may gain a settlement: and that I do not dispute: and therefore if the dairy-man, considering him and not the farmer as the occupier of so much of the farm as the cows were depastured upon, and had been rated as such for it, I do not see what objection could have been made. But here the objection is that the farmer is rated for the whole farm, the profits of which arise principally from the stock upon it; and a part of these profits are again required to be subjected to another rate in the hands of the dairy-man. But there is no objection to the rate as it now stands; and great inconvenience would ensue if the profits of different persons out of the same farm were subdivided, and a proportionable rate laid upon each instead of one general rate for the whole on the occupier of the whole. A farmer may make a bargain with one man to let him a field of grass to rent, or he may let the aftermath of his meadows, some to one, and some to another; and this may not only vary every year, but every month or oftener in the neighbourhood of populous towns. These are substantially the tenants of the lands, while their subordinate interests subsist, and might be rated for it during such holding, but if there be one general rate made on the general occupier of the whole farm, including all these particular profits and subdivisions of interests by which in fact he is benefitted, who can say that he is injured by the rating of one for the whole, rather than the several tenants of those partial interests, for their respective proportions, deducting the value of them from the rate upon the general occupier? As to the convenience of the general rate for the whole there can be no question of it. Other cases may be put. The owner of a house and garden may let the profits of his garden to his gardener, retaining the use of it in other respects upon condition of the latter supplying his table with certain articles, or upon a rent; and though the gardener might be rated

under an agreement that they should be depastured in particular parts of the farm, ought not to be rated separately, and that it was better to have one rate, for the entire profits of the farm, imposed upon the farmer himself. (1)

SECT. II.

Of the beneficial Occupation.

Must yield profit.

To constitute a rateable occupier, it is necessary not only that there should be an occupation in fact, but that it should yield some return, in the parish for which the rate is made, the assessment being made on the profits of the subject assessed. (2)

Meeting houses, &c.

Therefore the preacher of a meeting-house is not rateable as the occupier, unless he lets out the pews so as to reap a profit from it (3). Neither is an house converted into a conventicle, and used for no other purpose, rateable to the poor's tax (4). So where a quaker's meeting-house was solely appropriated to charitable and religious purposes, the basement story being divided into a number of small rooms; one occupied by a door-keeper, with a small salary, payable out of the quakers' donations; the remainder by a number of their poor, who are likewise maintained out of the same fund; the meeting-house, or upper part, being also appropriated solely to religious and charitable purposes, no pecuniary advantage being made

rated for this interest, yet if the owner was rated for his house and garden, what objection would any other person make to the rate on that account: the principle is that the estate which has once paid shall not be made to pay again."

(1) Ibid. and see ante, 152. n. (1).

(2) Lord Bute *v.* Grindall, 1 Term Rep. 338. 2 H. Black, 267. Per Buller, J. Atkins *v.* Davis, Cald. 325.

(3) Rex *v.* Southwark, 2. Stra. 743.

(4) Anon. 1 Bott, 119. Pl. 157.

thereof;

thereof; the court was of opinion, that neither the trustees nor any other person was rateable, for there was no occupier, nor any profit made of the premises.(1)

What profit rateable.

Where a profit does exist, it is immaterial whether the return is annual, and in a fixed unvarying proportion (2); or whether it is uncertain in the amount, and subject to risk and expence (3). But in order to render the occupier rateable, it is not only necessary that the thing should yield a profit, but that some emolument should be derived from the occupation in a personal and private respect(4); and where such an occupier exist, the law looks to the productive value of the thing as the fund to be taxed, without reference to his beneficial share of it; for the tax is laid upon the entire profit which the property yields, to whomsoever payable.

Tenant who has hard bargain, &c.

Thus, if a landlord makes a hard bargain with his tenant, so that he derives no profit from his farm, the tenant is notwithstanding rateable to the poor (5). So where the lessees of a coal-mine paid as a rent one-sixth part of the price of the coal raised from the mine, without deduction of the expence of working, and incurred a loss thereby. But they embarked in this losing adventure knowingly, as the cheapest way of getting at their own adjoining coal, when they had worked out this colliery which they rented. The lessees were held liable to the

(1) Rex *v.* Woodward, 5 Term Rep. 79. But it is otherwise when the surplus profits are applied to the use of the preachers. See Rex *v.* Agar, post. and the opinion of Lord Ellenborough, C. J. upon this case, 14 East, 263.

(2) Jones *v.* Maunsell, Doug. 302. Rowls *v.* Gells, Cowp. 451. In Atkins *v.* Davis, per Buller, J. Cald. 325. Rex *v.* Alberbury, 1 East, 534. Rex *v.* Woodland, 2 East, 164.

(3) Ibid.

(4) Per Lord Ellenborough, C. J. Rex *v.* Terrot, 3 East, 506. post.

(5) Per Lord Kenyon, C. J. arg. Rex *v.* Parrot, 5 Term Rep. 593.

rate, for they are occupiers of rateable property yielding a clear profit: the court cannot enquire whether the tenant has made an unprofitable bargain. (1)

Lessee of exhausted coal-mines.

On the other hand, the lessee of a coal-mine was rated for a colliery as of the annual value of 200l. under the following circumstances: He had taken a lease for a number of years, at a clear yearly rent of 200l. which he covenanted to pay, whatever the state of the mines might be; but the mine became exhausted and ceased to be worked before the rate in question was made. The court held that he was not rateable. Lord Ellenborough, C. J. observed, that in Rex *v.* Parrot the subject matter itself was profitable, and produced value to the owners, though the immediate occupiers derived no profit from it, all the net profits of the mine being absorbed by the sixth part of the gross value which they had covenanted to pay to the owners. But here as the mine is exhausted, the subject matter of profit is gone, although the rent, which was no doubt calculated upon the probable average produce during the whole term, be payable. (2)

The operation of the two foregoing rules has given rise to several decisions upon the rateability of real property in the hands of particular persons, which have chiefly arisen in the case of charitable institutions, and property occupied for public purposes. If there is no beneficial occupier for private emolument, the property is not liable to assessment; but when such an occupier does exist, he is rateable, although the ultimate object of his occupation be to promote a charitable institution or advance the public good.

The rateability of property occupied for either of these purposes seems governed by the same principles; it may

(1) Rex *v.* Parrot, ante, 158. (5). (2) Rex *v.* Bedworth, 8 East, 387.

how-

however render the subject more intelligible, if the decisions upon each are separately classed.

The trustees of an hospital exempt.

With respect to charities, it has been held that the nominal trustees, or the governors of an hospital are not rateable for the hospital itself, although part of the area or site had paid poor-rates before its appropriation to the present use. (1)

The founder of a charity.

So where Mr. Waldo provided an house previously rated in the parish of M. and placed ten poor girls in it, some being taken from the parish of M. and some from other parishes, who were educated, maintained, and brought up on this charity. He provided and paid a woman as his servant, to superintend and instruct them in reading and working, and qualify them for service. This woman and the children were the only persons resident in the house, which was solely appropriated to the purpose, all vacancies being supplied from time to time at W.'s discretion. Mr. W. was held not to be an occupier rateable for this house, for he makes no profit of the building. (2)

But being occupied for charitable purposes, if beneficial, exempts not.

But the charitable purposes for which land is given in occupation does not excuse an occupier who is otherwise within the act. Land or houses granted to a charity, not less useful than the maintenance of the parochial poor, or even operating collaterally for their relief and assistance, and so far applied in exoneration of the rate, are notwithstanding liable.

School-master oc-

As where the master of a free-school was appointed by the minister and inhabitants of the parish under a deed

(1) Rex *v.* St. Bartholomew's Hospital, 4 Burr. 2405. Rex *v.* St. Luke's, 2 Burr. 1053.

(2) Rex *v.* Waldo, Cald. 358.; and see the opinion of Lord Ellenborough, C. J. upon this case, Rex *v.* Agar, 14 East, 263. post.

of

of indenture, whereby a house and garden were assigned "for the habitation of the master, and for the use of him "and his family freely, without payment of any rent, "income, gift, sum of money, or other allowance what-"soever, for or out of the same, which, together with "certain lands and annuities, were given for the teach-"ing of ten boys, sons of the meaner sort of the inhabi-"tants of the parish;" it was held, that the master being found the occupier of the house and gardens, was rateable for them. For there is no exception of property given for charitable purposes, in the act respecting the relief of the poor. Lands appropriated for the establishment of the religion of the country, are, in one sense of the word, lands given for charitable purposes; but parsonage houses, glebe lands, &c. are rateable in the hands of the occupiers. (1)

occupying a free-school.

So where Lord Rich, having founded a corporation in the parish of F. for the relief of the poor there, granted to the corporation and their successors a messuage, twenty acres of land, and four of wood; and appointed the messuage for an alms-house for the dwelling and lodging of five poor and impotent persons, with a grave woman to attend them; the said six persons to have freely, during their lives, by the permission of the corporation, their dwelling chambers and lodgings in the said alms-house, with the hall, kitchen, buttery, cellars, barns, and all profits and commodities to the said alms-house belonging; and also that the said corporation should permit them to have and occupy the said land for their cattle, and a rood of wood each year for firing; the persons elected, in case of non-conformity to the regulations of the charity, being liable to be put from his or her room and place, lodging and living, &c. as if the party so refusing were dead. Six persons who had not been previously pa-

Beneficial occupiers of lands under a charity.

(1) Rex v. Catt, 6 Term Rep. 332.

rishioners, where the premises lay, possessed the said messuage, land, and wood, being of the annual value of 15l. which were never rated before; keeping up a stock of cows according to the founder's directions, and paying a labourer for making their hay and cutting their wood, both of which they disposed of to their own use. The visitor of the said alms-house having frequently granted them additional relief. The king's bench was of opinion, on a case stated by the sessions, that they are liable to assessment, if the parish officers think it prudent to rate them. For the property comes within the general description of rateable property in the statute; and these persons ploughing, sowing, and reaping for their own benefit, have every sort of occupation which any other person can have, and the smallness of the benefit cannot constitute an exemption. (1)

Nor application of the rent to charitable uses.

Upon the same ground, the application of the rent paid by the occupier to charitable purposes does not exempt him, although his liability must necessarily diminish the amount of the fund which is to be so applied. Thus hospital lands are rateable in the hands of a beneficial occupier. (2)

Chapel.

A private building always used for the performance of divine service according to the rites of the church of England, and by covenant between the lessor and lessee *never to be used for any other purpose*, is rateable in the hands of the lessee who lets the pews and receives the rent thereof for his own use and benefit, although the rent paid by him had always been applied to the public and charitable purposes of another parish.

Some stress seems to have been laid in this case upon the building not being a chapel or consecrated place, but

(1) Rex *v.* Munday and others, 1 East, 584.

(2) Anon. 2 Salk, 526. Rex *v.* Gardner, Cowp. 79.

a mere

a mere private room let out for the purposes of religious worship, which the owner might apply at his pleasure to any other use, inasmuch as the restriction by covenant could not vary the nature of the property. Mr. Justice Buller however intimated a strong opinion, that a member of the established church, parson, or vicar, who has the profits of the pews of his church given him by the parish, *in increase of his benefice*, is rateable for such profits. (1)

Methodist chapel.

The trustees of a Methodist chapel, in whom the fee was vested, and who let out the pews for an annual rent, were held rateable for the chapel though they expended more than the annual rent in supporting the establishment, in the repairs of the chapel, in paying salaries to the attendants and singers, and providing a house and board for the Methodist preachers who officiated there. For a profit is made of the property to the full by the trustees, who are the occupiers, and let out the seats and receive pecuniary advantage from the use of them. And admitting that there must be some expences incurred in producing the profits, it depends upon circumstances, and the mode of administering the fund, what that profit shall be; or in other words, upon the manner in which the trustees choose to apply the proceeds. Then, as it in fact produces profit which the trustees afterwards dispose of as they please, the case does not differ from that of other buildings which produce profit. (2)

(1) Robson *v.* Hyde, Cald. 310.

(2) Rex *v.* Agar, 14 East, 256. "This is in substance a rate on the ministers, for if they had let out the pews and received the rents, they would only have received the surplus profit after payment of all the necessary expences of the chapel: but the pews are let out by those who are in effect the trustees for the ministers, for they hand over to them so much as remains, after defraying the expences. The trustees must therefore be considered as the occupiers, because the property is in them, and they let out the pews, and they are therefore rateable for the profits in the same manner as ministers would be if they let out the pews. Per Le Blanc J. Ibid.

Charities, where rateable.

The distinction therefore as to where charities are rateable, and where they are not so, seems to depend upon this—whether there is any body who can be rated as *beneficial occupier*. The trustees are not rateable when they intermeddle with the property merely as nominal trustees, *because their occupation is not beneficial to themselves or to others who could be deemed occupiers if they were not.* Neither are the poor, where they are mere inmates without power or controul over the premises which they inhabit, as in the case of St. Luke's and Bartholomew's hospital, Mr. Waldo's alms-house, and the other cases cited, *for they are not occupiers* (1). But where the objects of a charity are *occupiers*, as in Lord Rich's charity (2), or where another is *a beneficial occupier* for their benefit, as in those of hospital lands (3), or the trustees of a meeting-house, of which the surplus profit goes to the preachers (4), the occupier is rateable, without considering the charitable purpose to which the profits are dedicated, even though the rate must ultimately come from thence. Nay, where the charity is appropriated to assist the parochial poor for whose support the rate is raised, the property seems liable to be taxed if occupied, although the assessment may be nugatory in some instances, and highly improper in others. (5)

Public property.

It has been already stated, that property occupied solely for the public use is not subject to assessment.

Public tolls.

The tolls of a sluice in a navigation were vested in commissioners by statute, "to be applied and disposed of to the uses and purposes of the said act, and to no other whatever," these uses, &c. being for improving the navigation and draining the land. The commissioners canot be rated for these tolls, because they are mere trus-

(1) Ante, 160.
(2) Ibid.
(3) Ante, 162. n. (2).
(4) Rex v. Agar, ante, 163.
(5) Rex v. Catt. ante, 161. Rex. v. Munday, 1 East, 384.

tees

tees to superintend the execution of the act, without any personal advantage (1).

Upon the same principle trustees under a drainage act are not rateable in A. for lands purchased and buildings erected by them there for the outlet of the drainage, where they receive no benefit for such property in A., the whole being derived to the owners of lands in other parishes which were drained by the outlet. For they have no beneficial occupation of the property in the parish either for themselves or for others (2). So likewise turnpike tolls, paid

Drainage beneficial to another parish.

(1) Rex *v.* Salter's Sluice Navigation, 4 Term Rep. 730.

(2) Rex *v.* Sculcoats, 12 East, 40. The parish officers of Sculcoats, in the rate made for the relief of the poor, charged the commissioners of the Beverley and Bramston drainage in a certain sum in respect of certain lands and buildings in that parish, purchased by them, and converted into a drain, under the act of parliament after mentioned, which land was cut for the purpose of the drainage, and is now covered with water, containing six acres. Against this, the commissioners appealed, and the sessions quashed the rate. The special case stated the act (38 G. III. c. 63.) by which commissioners were appointed for draining low grounds in certain parishes therein named. That for this purpose they purchased the lands and buildings now rated, which lands and buildings were converted into part of a drain extending from Beverley to Sculcoates, 10 miles; but no part of the lands thereto adjoining are benefited thereby: previous to the purchase these lands and buildings had been rated, but since the making of the drain they had not. And further, that the proprietors of the said low grounds had been benefited by this drainage. That the commissioners were not rateable, as having a mere naked trust, and no beneficial interest, was contended on the authority of the Salter's Load Sluice navigation case. (4 T. R. 730.) On the other side were urged, s. 38. of the above act, conveying the above estates to the commissioners and their heirs, who were therefore in the actual occupation of the property. Also s. 39. which says that they and their heirs shall be deemed in law in actual possession to all intents and purposes whatsoever. And s. 98., by which they are to bring actions of trespass. Lord Ellenborough C. J. said he could not find by the act that the commissioners were in the receipt of any fund for their own benefit, or were trustees of any divisible fund in their hands in this parish, for the benefit of others; and certainly not so for their own benefit. That the only persons benefited were the owners of lands benefited by the drainage in other parishes, and in those liable to be rated for the improved value of their premises. Bayley J. asked, if there was any beneficial interest derived in this parish from these works. Then they cited R. *v.* Gardner, R. *v.* Aberavon, and

paid for the benefit of the public, are exempted from rate. (1)

Lessee of barracks for the crown.

A colonel of a troop of horse-guards, by order of the crown under the sign manual, took a lease of stables and a riding-house for the use of the troop, at a certain rent, the lease to be binding on the captain and colonel of the troop for the time being, and the rent being stopped out of the pay of all the troop, except the colonel, chaplain, and surgeon. The only use made of these stables was to keep the troop horses, with the accoutrements belonging to them, except the horses and accoutrements belonging to the captain and colonel of the troop, which never have been kept there. The colonel, with whom the agreement was made, died before the time at which the term was to commence, and possession was delivered to his successor, upon whom a rate was made. But he was held not liable as the occupier; for although he is the lessee of the stables, he derives no benefit from them: they

R. *v.* The Dock Company of Hull. Lord Ellenborough C. J. In all these cases the property rated yielded pecuniary benefit, or that which was capable of being estimated and converted into pecuniary benefit within the parish to the parties interested, but here the benefit results to the lands obtained which lie in other parishes, and the property would be liable to a double rate if it were also rateable in the hands of the commissioners. Here is no benefit received by the commissioners for themselves or others within this parish, which is capable of being rated. The benefit is all divided in other parishes. The Dock Company of Hull were in the receipt of tolls for the benefit of the share holders in respect of the use of the docks within the parish in which they were rated; but the commissioners are the mere instruments of benefit to land owners elsewhere. I know of no instance where a canal company has been held rateable for the mere space occupied by the canal in a particular parish, if no tolls were received or become due there; and I cannot distinguish between land converted into drainage and a canal. And finally, he delivered the opinion of the court, that the commissioners having no beneficial occupation of the property in this parish, either for themselves or others, were not liable to be rated for it. Order of sessions confirmed.

(1) Per Lawrence, J. Rex *v.* Proprietors of Staffordshire Navigation, 8 Term Rep. 340.

are used for a public purpose, and as such are not rateable. (1)

By 32 Geo. III. a sum of money, belonging to the suitors of the court of chancery, was directed to be laid out in government securities, and the interest applied under the order of the Lord Chancellor, towards building and completing proper and convenient offices for the masters in chancery and their clerks, and the secretaries of bankrupts and lunatics, and their clerks, and safe and secure repositories for the deeds, books, papers, and writings belonging to the suitors of the court and delivered to the said masters or secretaries of bankrupts and lunatics, together with a public office for the suitors of the court of chancery, in the stead or place of the then public office for the reception of the said masters and secretaries, and the transaction of their respective business therein. And the act further provides, that the ground and buildings thereon shall be vested in his majesty, his heirs, and successors, for the purposes of the act. In pursuance of this act a building, with proper offices, was erected for the reception of the masters, and the transaction of their respective business therein; and they have been used for the purposes of the act, and no other purposes whatever. But a person was employed to collect and take care of the buildings and papers, who was paid by the masters, and lodged in three small rooms in the basement story. The masters in chancery, who occupy these rooms only in the business of their public station, are not inhabitants and occupiers within the meaning of the legislature, so as to be liable to be rated for them; for a building to be rateable must be occupied for private purposes. (2)

Masters in Chancery for their offices.

(1) Lord Amherst *v.* Lord Somers, 2 Term Rep. 372. Eckersall *v.* Briggs, 4 Term Rep. 6. Rex *v.* Terrot, post. 173.

(2) Holford *v.* Copeland, 3 Bos. & Pul. 129. The question arose upon a paving act. But Lord Alvanley, C. J. in delivering the judgment of the court of Common Pleas, evidently considers it as applicable to the poor rates. And see the opinion of Lord Ellenborough C. J. Rex *v.* Terrot, post, 173, to the same effect.

Crown property.

Property in the immediate hands of the crown is directly connected in principle with the foregoing determinations.

The king.

Thus the royal palaces are not liable, and never have been rated (1). It seems taken for granted in the case, that this is a kind of prescriptive exemption of lands which have been vested in the crown ever since passing the act, and have never paid the tax, and that it does not properly arise from the king's prerogative. For the case sent from the sessions for the court's opinion, stated as facts proved before them, that His Majesty is rated to the poor's rate for the mews in the parish of New Windsor, and that the same is paid by the master of the horse to his majesty; and that His Majesty is rated for the mews in the parish of St. Martin, in the city of Westminster; and Lord Mansfield seemed to sanction the propriety of rating the crown in these instances, by observing that, "as to "the mews in St. Martin's parish, that part of it only is "rated which was taken in of late years, and which "was before that time ground belonging to some adjacent "parish (2)." This opinion proceeds partly upon the ground, that the mews are extra-parochial; but if that were so, they could not be rated to an adjoining parish, unless in aid (3), whether they belonged to the crown or to a private individual: and it seems difficult to maintain that they are exempt upon the ground of prescription, for it has been often held, that no custom, prescription, or usage, can have any power in restraining the operation of a statute which is so modern as 43 Eliz. (4) The true reason therefore seems to be that already given, viz. that the king not being named in the act, is exempted by virtue of his prerogative. (5)

(1) Per Lord Mansfield, Rex *v.* Matthews, Cald. 1.

(2) Ibid.

(3) See post, chap. xiii.

(4) Ante, and Cald. 414.

(5) See Holford *v.* Copeland, 1 Bos. & Pul. 139.

But

But upon whatever principle the sovereign's immunity from this tax depends, it does not extend beyond his actual occupation. Wherever an occupier exists for private benefit he may be rated; and it makes no difference whether he is a civil or military officer of the crown (1). It has been decided that when the site of a palace is demised to a subject for a certain permanent interest, the grantees who occupy are rateable (2); also those who beneficially occupy part of the royal parks, and (perhaps for the same reason) of the palaces to their own use, are liable to assessment (3), although the premises are to be considered in all other respects as in the hands of the crown.

Does not extend to occupiers under him.

So the crown's lessee of certain duties, payable out of lead mines, is rateable. (4)

The ranger of Richmond park is, by virtue of his office, entitled to certain profits arising out of land inclosed in the park, the meadows of which are mowed at the King's expence for the use of the deer, and the overplus applied for the use of the King's and ranger's horses; the arable lands are manured, ploughed, and sown by the King's servants, and with his horses, but the seed is found and the corn reaped by and for the ranger's use. It was found also by the verdict, that the profits arising to the ranger for the whole of the said lands were worth 100l. a-year, and he was held rateable for the same, as the profits of lands appertaining to his office of ranger; but the court doubted at first whether his occupation was sufficiently stated (5). So a keeper of a royal park appointed by

(1) Per Lord Ellenborough, C. J. Rex *v.* Terrot, 3 East, 514.

(2) Duke of Portland's case, 1 Const. 131. Pl. 166. And Mr Caldecott's note in page 158. of his Reports.

(3) Rex *v.* Matthews, ut supra. 168. n. (1)

(4) Rowls *v.* Gells, ut sup. 112. n. (1)

(5) Lord Bute *v.* Grindall, Ibid. n. (5)

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the ranger during pleasure, and occupying a lodge and two acres of land within the parish, is rateable for what he occupies (1). The master of the rolls, and the auditors and tellers of the Exchecquer, are rateable for houses which they occupy, in respect of their offices as servants of the crown. (2)

These principles are so fully recognized and settled in the judgment delivered by Lord Ellenborough, C. J. that little room seems to remain for future doubts upon the subject.

Colonels' rooms in barracks.

The appellant was a lieutenant-colonel in the artillery, and the premises in which he resided, and for which he was rated, were the property of the crown and part of a barrack. They were fitted up for a field-officer, under the direction of the board of ordnance, and at a considerable expence. The building consists of two stories, with four rooms on each floor, besides attics. The rooms on the ground floor are thus appropriated; one room as a store-room, another as a quarter for the adjutant, a third as an office for a commanding officer to transact the business of the regiment, and the fourth, as the appellant's kitchen. The whole of the first floor, and the attics, are the residence of the commanding officer of the artillery *for the time being* (which the appellant then was), together with a kitchen, wash-house, and other offices, coach-house, stable-yard, and small garden or drying-ground. The appellant resides there with his wife, family, and servants; two of the latter, a man-servant, who is one of the private soldiers of the artillery, and his wife, who is cook to the colonel, sleep in the attic, and the other female servant sleeps in one of the rooms on the first floor. The part used by the appellant is in every respect separate and distinct from the rest, there being no

(1) Rex *v.* Matthews, 168. n. (1)

(2) Per Lord Kenyon, Rex *v.* Hurdis, 3 Term Rep. 497.

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communication between it and any other apartment. At the time of fitting up the building, chairs, tables, fire-grates, and the usual barrack furniture, were supplied by the crown; beds, and the residue, by the appellant. The court were of opinion, that the appellant was rateable as the occupier of these premises, and confirmed a rate made upon him as such.

By Lord Ellenborough, C. J. who delivered the judgment of the court.—"The principle to be collected from all the cases on the subject is, that if the party rated have the use of the building, or other subject of the rate, as a mere servant of the crown, or any public body, or in any other respect for the mere exercise of public duty therein, and have no beneficial occupation of, or emolument resulting from it, in any personal and private respect, then he is not rateable. The property of the crown, *in the beneficial occupation of a subject*, whether he be a *civil* officer of the crown, as in Lord Bute's case (who was ranger of the new park near Richmond), and in the case of the comptroller of Chelsea hospital, Eyre *v.* Smallpace, 2 Burr. 1059; or as a *military officer*, as in Hurdis's case (1), he is in each case equally rateable. For, in these cases, each of the persons rated had a degree of personal benefit and accommodation from the property enjoyed by him, *ultrà* the mere public use of the thing; and which excess of personal benefit and accomodation, *ultrà* the public use, may be considered as so much of salary and emolument annexed to the office, and enjoyed in respect of it by the officer for the time being. But if the use of, or residence upon the property, be either *as the servant* of the crown, and for public purposes only, as in Lord Somers's case, or as a mere public officer or servant, or of any other description, such as the superintendant of the Philanthropic Society, Rex *v.* Field, 5 Term Rep. 587.

(1) Post. 175.

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the trustees of a meeting-house, the servants at St. Luke's, the masters in chancery, in respect of their public offices (1); in all such cases, the parties having the immediate use of the property, merely for such purposes, are not rateable, because the occupation is throughout that of the public, and of which public occupation the individuals are only the means and instruments. It is said, that if the commanding officer be rated for the degree of private accommodation he enjoys in a building of this description, why not the soldiers in their barracks for the accommodation they enjoy there? I am not aware that private soldiers have any accommodations in barracks beyond what are required for the mere ordinary uses and purposes of animal nature, I mean for sleeping and eating, and the like; but if their barracks should supply even them with any accommodation of a beneficial and valuable, and not strictly of a necessary nature, the analogy between the two cases would rather afford perhaps a ground for including them, under such circumstances, in the rate, than for excluding an occupier of the present description from it. The reason of the thing, and the sound and established construction of the statute, subjects every person, who has the beneficial use of any local visible property in a parish, to this species of public contribution. The parish is liable to be burthened with settlements of them and their children: a part of the property antecedently contributing to the poor rate is, by being thus built upon, and appropriated to such public purposes, effectually withdrawn from its liability to contribute, unless the nature and quality of the occupation thereof restores and throws it back again, either in the whole or in part, within the scope and reach of this species of parochial contribution. And the immediate occupant has, in fact, nothing to complain of: for I believe it never has occured in experience, that the *quantum* of the mere rate upon an

(1) See Holford *v.* Copeland, 3 Bos. & Pull. 129.

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occupier of this kind has exceeded, in amount, the benefit and advantage derived to him from his occupation. Whether the commanding officer could withdraw himself from the rate, by contracting his occupation in some proportionable degree, within the same narrow limits of merely necessary enjoyment with the soldier in his barracks, will be a question to be decided when it shall occur. It is enough for us to say at present, that upon the principles laid down and acted upon, in the cases already referred to, the commanding officer in question, has such a beneficial occupation of these apartments, and other conveniences, as to render him rateable for the same, and that this rate of course should stand, and the rule for amending the same be discharged." (1)

Quantum of interest and title immaterial.

Where lands or other hereditaments are beneficially occupied, the quantity of the occupier's interest, or the validity of his title to the possession, are immaterial (2). He is rateable during his occupation, although he holds at will (3); or may be turned out for misconduct (4); or if his title is altogether defective. As when the dean and chapter of Durham granted leases for 21 years of land, reserving a right to them and their successors, of laying, making, and granting waggon-ways, paying reasonable damage; the dean and chapter granted a waggon-way over lands thus demised, the grantee of which inclosed and occupied the soil of the line of way, erecting houses and putting up gates thereon, thereby excluding the lessees and their under-tenants. The court were of opinion, that the grantee of this waggon-way was rate-

(1) Rex *v.* Terrot, 3 East, 506.

(2) Per Buller, J. Lord Bute *v.* Grindall, 1 Term Rep. 338. Per Lord Mansfield, Jones *v.* Maunsell, Doug. 362.

(3) Per Buller, J. Lord Bute *v.* Grindall, ante (2). Rex *v.* Matthews, Cald. 1. Rex *v.* Hurdis, 3 Term Rep. 497. Per Lord Ellenborough, Rex *v.* Terrot, 3 East, 513. Per Lawrence, J. Rex *v.* Aberavon, 5 East, 453.

(4) Rex *v.* Munday, 1 East, 504.

able

able for the land, "as a piece or parcel of ground called a waggon-way," so long as he occupied it; for the question is, whether the defendants are, or are not *possessed* of property that is rateable to the poor? And though nothing more passed than a way leave by the grant from the dean and chapter, for they could grant no more, not having reserved by the original lease a right to grant the land, yet as the person rated occupied the land, it is sufficient; for the court are not to inquire into the title of occupiers. If a disseisor obtain possession of land, he is rateable as the occupier of it. (1)

The occupier, if found by the session, conclusive.

The question of who is to be considered as the occupier, is generally a matter of fact, and when actually found by the sessions, the court of king's bench will hold themselves concluded by the finding, unless that question be expressly submitted to them, although the circumstances of the case would have warranted a contrary deduction (2). And when property is profitable in its nature, as lands and houses, it will be considered by the court as rateable unless it is expressly stated to them that no profit can be derived from it. (3)

Evidence of amount must be given.

But when the question before the sessions is upon the quantum of the rate, the officers making it must shew to the justices some probable ground for the amount at which they charge the party in the rate. The mischief of any other rule would be enormous. A small occupier may be rated at once in the round sum of 1000l. and left to struggle his way out of that charge as he can (4). When therefore the appellant being rated for tithe rents and compositions under an enclosure act, disputed the quan-

(1) Rex *v.* Bell, 7 Term Rep. 598. Rex *v.* Agar, 14 East, 2 C. 3. See also Rex *v.* Eyre, 12 East, 416. ante n. Pl. 158.

(2) Rex *v.* Turner, 1 Const. 126.

(4) Per Lord Ellenborough, C. J. Rex *v.* Topham, 12 East, 546.

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tum of the rate as well as the rateability of the property, the Court held that it was not enough for the parish officers to shew that he was in the receipt of rent of this kind, but they must give some evidence of the probable amount. (1)

The master-gunner of Seaford battery.

The master-gunner of the fort or battery of Seaford, who is a warrant-officer appointed and removable at pleasure by the master-general of the ordnance, though his office is usually considered as a provision for life, was rated as the occupier of the battery-house. The sessions found in their case, that being so employed in the fort, he occupied the whole of the house except one room, which is allotted to the under-governor by direction from the ordnance, and that the furniture of the house belonged to the master-gunner. The court held, that upon this statement he was properly rated; for the statute subjects every occupier of "lands, houses," &c. to be rated, and further that, the sessions having expressly stated that he is the occupier, they have by that finding concluded the question of his rateability. (2)

SECT. III.

Of the Occupation of personal Property to render it rateable.

Occupation of personal property.

To render personal property rateable, it must not only be in the possession of the person rated, but, when distinctly assessed as moveables, it should be his actual property (3). For the tax is not imposed, as in the case of real property, in respect of occupancy, but upon the per-

(1) Rex *v.* Topham, ante, 174. n. (4).—The Court sent the case back to be reheard.

(2) Rex *v.* Hurdis, 3 Term Rep. 497.

(3) Per Lord Mansfield, Rex *v.* Ringwood, Cowp. 326. Rex *v.* Dursley, 6 Term Rep. 53. Rex *v.* Uffculme, 2 Const. 3 Edit. 233. Pl. 262.

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son's ability as an inhabitant, of which ownership, and not possession, is the criterion.

Silk throwsters.

Silk throwsters who reside in the country, receive raw silk from their employers in London, which they clean and throw in their mills according to the directions given them, and then return it forthwith to their employers, charging so much per pound of silk. They are not rateable for this silk as part of their personal stock, for it is not their property, and their profit is derived altogether from personal labour. (1)

But possession of personal property is evidence upon which the sessions ought to conclude, that the possessor is the proprietor, unless the contrary is proved. (2)

Must yield profit.

Personal property must likewise yield a profit in the hands of him who is rated, or it can not be assessed (3). Upon this ground a sum of money in a man's possession (4), and the furniture of his house, have been held not rateable. (5)

It is not enough for a case to state that particular inhabitants appeared in possession of stock in trade to specified amounts. The sessions should also state whether this property belonged to the several persons sought to be included in the rate, or if it did, whether or not it

(1) Rex *v.* Sherborne, Trin. 47 Geo. III.

(2) Rex *v.* Darlington, 6 Term Rep. 468.

(3) Rex *v.* Canterbury, 1 Bott. 132. Pl. 168. Rex *v.* Andover, Cowp. 550. Rex *v.* Dursley, 6 Term Rep. 53. Rex *v.* Ambleside, Mich. 53 Geo. 3. 16 East.

(4) Rex *v.* White, 4 Term Rep. 771. But judgment was given with some scruples by two of the three judges then in court and in a subsequent case, Lord Kenyon says, "If a person chuse to keep his property in money, and the fact of his possessing it be clearly proved, he is rateable for that." Rex *v.* Mast. 6 Term Rep. 154.

(5) Rex *v.* White, ut supra, and see ante, that they may be rated if they yield a profit.

produced

produced profit or was not liable to incumbrances equal in value to the property itself. (1)

Personalty must be productive.

A case stated that certain persons were respectively possessed of visible stock in trade, and liable to be assessed in respect thereof, if by law it was liable to be rated; that personal property was immemorially rated, and the rates occasionally collected in the township down to 1796, and rated but not collected from thence to 1807. But the sums were nominal, having no relation to the actual value of the property, and since 1807 it was not rated at all. It was further stated that evidence was given of the clear amount of the surplus of stock in trade or other personal property in the instances appealed against; but the Justices added, that not being satisfied from the evidence that there was any surplus by which they could amend the rate, the court held that visible property, such as stock in trade, merely as being visible is not liable to be rated, it must also be productive, and the justices having found that it was not productive, or, which is the same thing, that it was not proved to be so, that finding concludes the question. (2)

It was laid down by one judge in an early case, that personal property, if rateable at all, must at least be ascertained, and not fluctuating and uncertain (3). If the observation was designed to extend to all profits which are of a fluctuating nature, it is inaccurate, for it would exclude almost every kind of personal property, except monies lent out at interest (4). But it is self-evidently true, so far as respects each particular rate; since in order to impose the tax, the profits out of which it is to arise must be first liquidated and ascertained. (5)

(1) Rex *v.* Dursley, when the order was quashed for this defect, 6 Term Rep. 53.

(2) Rex *v.* Sir Archibald Macdonald, 12 East, 324. ante, 119.

(3) Per Willes, J. Rex *v.* Canterbury, ut supra, 176. n. (3).

(4) Atkins *v.* Davis, Cald. 337.

(5) See ante, n. (2). Rex *v.* Sir A. Macdonald.

Personalty of crown and public exempt.

Personal property belonging to the crown and the public are exempt from the poor-rate, as well as real property occupied by them (1). But this exemption does not extend to the property of private individuals hired for the public use at a stipulated price. A certain number of packet boats are employed to carry the mails between the ports of Holyhead and Dublin. The vessels are the captains' property, who build and repair them; but the captains are appointed by the post-office, and receive an annual salary of 50l. each. They are also allowed to carry passengers, &c. which constitute the chief part of their profits, but they are altogether under the controul of the post-office as to the time of sailing, and the taking or receiving passengers, and they cannot be absent from their vessels without leave of the postmaster-general, or his agents, who may suspend them if their conduct is disapproved of. These vessels are not exempt from the poor's rate, for the crown has no property in them, even *pro tempore*. The post-office cannot appoint any other person to the command of the vessel, and though government may exercise authority over them in certain particulars, it is no longer, nor otherwise, than as the masters chuse to retain their employment; for the crown cannot divest the masters of their controul over the vessels and appoint others to command them, and there is no reason why the ship of an individual should not be rateable, when hired to perform certain services by government, any more than when she is freighted by private individuals for the purposes of commerce, the property in both cases still remaining in the owner. (2)

(1) See the opinion of Lawrence, J. Rex *v.* Jones, Trin. 47 Geo. III.

(2) Rex *v.* Jones, supra, (1). 8 East, 451. So transports engaged to carry out troops for government are rateable although the masters are subject to the controul of the transport-board, for that does not divest the owners' property in these vessels, and transfer it to the crown. See the judgment of Lawrence, J. Ib.

CHAPTER. X.

Of Rating double.

1. Real property.

REAL property is not to be rated twice: the assessment is to be levied on the occupier according to the total profit, every person who has an interest therein paying his proportion of the tax. So that the occupier is the receiver of the whole produce, who, after defraying all charges, distributes a fixed share of the net profits to those under whom he holds, and retains the remainder in remuneration of his trouble.

Rent, &c.

Upon this principle, rents are not rateable in the hands of the landlord, for it would be a double assessment (1). So quit-rents, and the casual profits of a manor, such as fines paid upon renewal of copy-holds, heriots, &c. are not assessable; the occupiers being respectively assessed to the entire value of the lands out of which these interests arise. (2)

2. Personal property. Stock on farm.

Personal property is also exempted, where it has been taxed in another shape (3). Thus the stock necessary for cultivating and rendering a farm productive, is not rateable, because the annual profits of the land being rated, the profits of the stock are assessed in those of the land. In estimating the yearly value of a farm, there-

(1) Per Lord Mansfield, Rowls *v.* Gells, ante, 155. (2). Rex *v.* Toms, Douz. 401. 1 Bott, 161. Per Eyre, C.J. LordBute *v.* Grindall, ante, 155. n. (5) But see Rex *v.* Bishop of Rochester, 21 East, 353. ante.

(2) Rex *v.* Vandewall, 2 Burr. 991. Per Lord Kenyon, Rex *v.* Alberbury, 1 East, 536.

(3) Regina *v.* Barking, 2 Ld. Raym. 1280. 16 Vin. Abr. 426.

fore,

fore, the annual loss of capital laid out in purchasing stock, with the expence of maintaining it, and the damage arising from wear and tear, operates in diminution of the profits, and should be deducted in assessing the land, instead of forming a separate article for taxation. (1)

Stock not fed on farm rateable.

"But, if a farmer derive profit from stock, kept on "his farm, but not connected with the management of "it; as if he keeps stock which he feeds with oil-cake "for sale, he is rateable upon for that stock, not as "stock of his farm but as stock generally from which he "derives a distinct and separate profit." Keeping them on his farm cannot exempt him, and he resembles a tradesman, who is rateable not only for his stock in trade, but also for his dwelling-house, although he converts part of it into a shop, the rent of which forms a drawback upon the net profit of his goods. (2)

Dairy underlet by farmer.

The stock of the farm is exempted by this rule, although it is underlet to another person, in such a way that the taking constitutes a tenement distinct from the farmer's. The occupier of a farm, *who was rated for his farm*, let his cows to an undertenant, called a dairyman, at a certain rent per cow; which cows, by agreement, were exclusively depastured in different grounds belonging to the occupier of the farm, at different times of the year, he being obliged to feed and maintain them without any expence to the dairyman, who made a profit of the milk and produce of such cows, independent of the profit made by the tenant. The rate was appealed from because the dairyman was not rated for this dairy; and upon a case stated for the opinion of the court of king's bench, it was contended that he ought to be rated,

(1) Post. chap. xii. p. 192. Ellenborough, C. J. Rex v. Thomas
(2) Ante, 179. n. (3). Per Lord Brown, Trin. 47 Geo. III. 8 East, 528.

either

either as the actual occupier of the land (1), or else as the occupier of profits issuing out of it, which were distinct from the farmer's. (2)

But the court were of opinion, that as the farmer was rated for the farm, they must take it that he was rated for all its actual profits. The dairyman's profits were not stated to be different from those of the land, but from those of the farmer. The whole profits of the land therefore being assessed by one general rate in the hands of the principal occupier, were not liable to be assessed a second time in the hands of one who occupied under him, and this would be no injury to the appellant. (3)

(1) Lord Bute *v.* Grindall, 2 H. Black. 266.

(2) Rex *v.* Tolpuddle, 4 Term Rep. 671. Rex *v.* Piddletrenthide, 3 Term Rep. 772.

(3) Rex *v.* Thomas Brown, Trin. 47 Geo. III. 8 East, 528.

CHAPTER XI.

Property, in what Place rateable.

In lands, &c.

PROPERTY, whether real or personal, or rather the product upon which the rate is laid, must arise in the district for which the assessment is made. In lands or tenements, this must of course be in the place where the thing itself is situate and yields its profit, whether the proprietor actually reside in the parish or not (1). Thus, if a gardener contracts to serve twenty families, and carries all his crop to their different houses (which are situate in different parishes), he is rateable for the whole of his garden where it lies. (2)

Water-works.

In the case of the water-works, it was the opinion of some judges, that the whole profits were assessable at the fountain head, in the parish where the water was collected, and from whence it was distributed by means of the fire-engine and other works fixed there, as it there first becomes property. For when water is once collected by means of a fire-engine, and brought within lands or buildings, for the purpose of supplying houses at a certain stipend, it is as much private property as the land itself. Whatever is done afterwards, is only done for the purpose of vending that property to greater advantage. (3)

Mr. J. Buller gives the following opinion in answer to a case put from the bar:—Whether if the water was carried

(1) Rex *v.* Cardington, Cowp. 518. and see ante.

(2) Per Buller, J. Atkins *v.* Davis, Cald. 327. ante.

(3) Ib. & per Ld. Loughborough, 357. But the authority of this decision is much questioned in the following judgment:

"A great deal of stress has been "laid, in the argument of this case, on "the supposed authority of the case "of Atkins and others *v.* Davis and "others,

carried in carts, instead of pipes, the pump could be rated for the value of all the water carried from thence? "Whether the water is carried in pipes or in carts to "the place where it is consumed, is quite immaterial. I "hold in the case put, that the pump would be rateable "to the value of all the water carried from thence: for "the pump is the permanent visible property, and "the quantity of water carried from thence constitutes "its produce." (1)

The 6 Geo. III. passed for better supplying the city, liberties, and precinct of Bath with water, and after reciting that there were springs of water in the neighbourhood belonging to the corporation, enacted that it should have power and authority to cause water to be conveyed from such springs to the city, and gave the corporation authority to enter upon and break up the soil of any public highway or waste, and the soil of any private grounds within two miles of the city, and the soil or pavement of any streets within the city, in order to draw and collect the *water of the said springs*,

"others, reported in Cald. 313., but "as the judges of the court of K. B. "were equally divided, no decision "which can be relied on as authority "was come to in this court. And al- "though it may be collected from "Lord Loughborough's judgment in "the exchequer chamber, that he "thought that 'the *proper place where* "*the value of the whole is to be taken* "*is the fountain-head from which the* "*whole is to be distributed*,' thereby "intimating two things; first, that the "whole profit should be assessed at "one place, and, secondly, that such "one place should be the fountain- "head: yet he adds, '*however, it is* "*not very material to consider that; "for upon the present action it is cer- "tainly sufficient to warrant the levy- "ing the distress, that here was a "*foundation to make a rate and some* "*property rateable.*' And indeed upon "that ground, viz. the form of the "action, which assumed the distress "to be illegal *in toto*, and upon the "difference which is to be found in "the language of the stats. 27 & 42 "Eliz., did the united judgment of "the court of exchequer proceed, "and not upon the supposed rate- "ability of the whole profits at the "fountain-head." Rex *v.* Corporation of Bath, 14 East, 621.

(1) Cald. 327. But per Lord Ellen- "borough C. J. For difference in the case "of the water being conveyed by pipes "into another parish, is that the land "of the other parish is made use of to "earn the profit." Rex *v.* Corporation of Bath, 14 East, 613.

and to make reservoirs, and erect conduits, water-houses, and engines necessary for keeping and distributing the water, &c. and to lay under ground acqueducts and pipes for the same purpose, and it vested the right and property of ALL these in the corporation. The corporation made several reservoirs in the parishes of Lyncomb and Widcomb, where the springs were situated, which reservoirs, by means of acqueducts and pipes laid under ground, partly in the same parish and through that of St. James into the parish of St. Peter and St. Paul's, supplied the city with water, and produced to the corporation a clear annual profit of 600l. The court were of opinion, that as the corporation were not residents in L. and W. they could not be charged *eo nomine* as inhabitants (1), but only as occupiers of the reservoirs they were empowered to make, and in which the water is kept, and that such reservoirs and waters kept therein are comprehended within the legal description of land, and were rateable as local and visible property within the parish of L. and W. But they were further of opinion that the corporation were only liable to be rated for the profits collected in that parish, and not for the whole profits of the water which flows from the springs and reservoirs. But as the water was conveyed from the reservoirs in L. and W. and distributed through several parishes in Bath, and as not only the apparatus but the soil itself in those parishes on which the pipes rest must be considered as conducive to and acquiring the water rent or profits; they were liable to be rated *per tanto* in the other parishes as occupiers of local visible property there. (2)

Fish

(1) Upon the authority Rex *v.* Nicholson, 12 East, 230. ante, 107.

(2) Rex *v.* Corporation of Bath, 14 East, 609. and the rate being made upon the entire profits made by it, was quashed on that account. So, by 49 Geo. III. a company established for supplying the town and neighbourhood of Rochdale with water, in pursuance of their power laid main pipes under the streets and highways for the conveyance of water, and the inhabitants, with the company's consent, put down pipes communicating from them to their respective houses, paying such rates for this

Fish caught at sea are titheable: the tithe is rateable in that parish, by being brought into which they yield a profit payable to the clergyman. (1) Fish.

The case of tolls is ascertained upon the same principle. Such as are paid *for passing* a bridge (2), a sluice (2), or a turnpike-gate (2), are evidently rateable where these things are situated; for it is there only that they become productive, as it is from passing there that the duties accrue. Toll's of a bridge, &c.

But the case of profits arising from tolls upon bargeways or inland navigations, which run through several parishes, has produced more discussion. They might be rated either in each parish through which the goods are carried in proportion to the number of miles they float in each; or at the place only where the tolls are actually collected, whether it be appointed at the discretion of the proprietors, or by direction of the statute by virtue of which they are taken: or, finally, they might be rated where the tolls become due. The court determined in favour of the latter mode, in conformity to the decisions already stated in the case of other tolls. Even where the tolls were directed by statute to be taken "at so much per mile upon all goods;" it was held, that they were assessable only in those parishes where the several voyages are completed, and to the amount of the profits arising Of a navigation.

this privilege and water as were mutually agreed on. An assessment on the company for their pipes and rates was held good; for the company used that part of the land on which their trunks and pipes were laid, and as there could be no difference between a reservoir of so many inches square, and pipes of so many inches diameter, it was not to be distinguished from Rex *v.* Bath Corporation. Rex *v.* Rochdale Company, Trin. 53 Geo. III. Maule and Selw. MSS.

(1) Rex *v.* Carlyon, 3 Term Rep. 385. But fish are only titheable by custom, whether taken in a pond, Nicholas *v.* Elliot, 2 Gwill. 616. 4 Gwill. 1581. Wood. 523. or in the sea, Holland *v.* Heale, Noy. 108. Anon. Cro. Car. 264. Goslin *v.* Harden, 1 Roll. Rep. 419. 3 Bulst. 241. Per Parker. C. B. Williams *v.* Baron, 3 Gwill. 937. and it is a personal tithe. Eod. Jud. Ibid. 1 Roll. Abr. 656. M. Pl. 2., i.e. the tenth of the parishioners clear gains. 2 Inst. 657.

(2) See ante, 76.

thereon.

thereon. For unless the voyage is completed, the contract being entire, nothing can be due from the owner of the goods. (1)

Leeds Canal.

The proprietors of the canal navigation from Leeds to Liverpool were enabled, by 10 Geo. III. and by 20 Geo. III. to make a canal from Leeds to Wanless Banks, and to take a certain sum per mile for the tonnage and wharfage of goods navigated thereon. These latter were exempted by the acts "from the payment of any taxes, rates, assessments, or impositions whatsoever, other than and except such taxes, rates, and assessments as the land which had been or should be used for the purposes of such navigations, cuts, or canals were or would have been subject to, if this act had not been made." By 34 Geo. III. the company were empowered to extend their line of canal through several townships, and among others to Habergham Eaves; to take a certain price per mile for tonnage and wharfage duty, but this new cut was not to be exempt from the payment of rates. In the course of the navigation, some goods were carried by one voyage on part of the exempted line into that which was unexempted, down to Habergham Eaves, where the goods were discharged and the tolls became due. The sessions confirmed a rate upon the company for the total amount of the tolls which arose from the goods discharged at Habergham Eaves, to the relief of the poor of that parish; but the court were of opinion, that the land on which the canal was made under 10 and 20 Geo. III. should be rated in the same manner as it was before these acts. "That the tolls are to be rated at Habergham Eaves, where they become due; but in calculating the quantum of toll which is the subject of the rate, allowance

(1) Rex *v.* Air and Calder Navigation, 2 Term Rep. 660. Rex *v.* Mayor of London, 4 Term Rep. 21. 1 Const. 201. Pl. 202. Rex *v.* Page, 4 Term Rep. 543. Rex *v.* Proprietors of Staffordshire Navigation, 8 Term Rep. 340. Rex *v.* the Leeds and Liverpool Canal Company, acc. 5 East, 325.

lowance must be made for so much of the toll as accrued in respect of the line exempted. For instance, if two-thirds of the line are exempted, then tolls which have come along the whole line to Habergham Eaves, will only be liable to be rated in the proportion of one-third. So if the goods have been carried fifteen miles, five miles of which are not exempt, they must be rated only for these five miles, and so in proportion. It will be easy therefore, in all cases, to calculate the proportion of tolls which are rateable according to the number of miles which the goods have been carried along the exempted and unexempted lines of the canal." The rate therefore being made, taxing the tolls altogether without this allowance, was quashed. (1)

Of a light-house.

The profits of tolls and duties payable to the Harwich light-houses, were adjudged not assessable upon the principle, that tolls can only be taxed where they become due. They were payable by all ships passing or coming into that harbour, part only thereof being received at the port of H. the remainder at many different parts of the kingdom. The collections were casual as ships pass by, or come into the harbour, and there was no other advantage arising to the proprietor from the light-houses. It is taken for granted in the argument, but not stated as a fact in the case, that the light-houses were situated within the parish for which the rate was made. But whether the tolls became due in an extra-parochial place, or where else, is not expressly mentioned. The court were of opinion, that the tolls were not locally situated within the parish, and therefore not rateable there. (2)

Marsh lands when drained.

By 17 Geo. II. c. 37. when waste lands, which were formerly fens and marsh, are drained and improved, and

(1) Rex *v.* Leeds and Liverpool Canal Company, 5 East, 325.

(2) Rex *v.* Rebowe, 1 Const. 142. Pl. 177. and see the argument, Rex *v.* Cardington, Cowp. 581. Rex *v.* Tynemouth, 12 East, 46. ante. 153(5).

the

the parish to which they belong cannot be ascertained, the occupier thereof, or of houses built thereon, tenements, tithes arising therefrom, mines therein, and saleable underwoods thereon growing, or hereafter to grow, are to be rated to the parish that lies nearest to such lands; and if any dispute shall arise as to what parish or place they ought to be rated to, the justices in quarter sessions shall, after due notice given to the persons interested, and to the parishes and places abutting and adjoining the said lands, cause them to be assessed in such place as they think meet, and their determination and allotment is to be final and conclusive.

Personal property, where rateable.

To render the profits of personal property rateable, they must arise in that parish for which the rate is made, and therefore the property must be situated there. (1) Upon this ground the owner was adjudged not rateable in the parish where he resided, for money which he had vested in real securities upon lands lying without the parish (2), nor for money laid out in the public funds. (3)

Ships, where rateable.

The place in which ships are assessable to the poor rate depends upon the same principle with the taxation of navigation tolls and tithe fish. Although the profits are derived from voyages performed at sea, they are rateable during their continuance in the parish which is their home, where the owner resides, and where they become productive. (4)

Packet boats.

The packet boats which ply between Holyhead and Dublin are built and repaired at the Head. The captains who are the owners, reside there, and are employed by the English post-offices at a salary of 50l. per ann. each. The chief source of their profits arises from carrying pas-

(1) Rex *v.* Howard, 8 East, 458. n. (a).

(2) Rex *v.* White, 4 Term Rep. 771. Rex *v.* St. John's Maddermarket, 6 East, 182.

(3) Rex *v.* St. John's Maddermarket in Norwich, ante, 141.

(4) Rex *v.* White, ante. (2).

sengers,

sengers, &c. from the parish of Holyhead to Dublin, and from Dublin to the Head. The passage money is paid where the passengers are landed, or leave the packet boat, and as much is received at Dublin as at Holyhead. Captains who reside in the parish of Holyhead, are rateable there for the profits accruing from the carriage of passengers, &c. that parish being their home, from whence they sail, and to which they return, Dublin being only the port *ad quem*, or termination of their voyage, and they yield profit there, for the passage-money from Dublin is actually earned, and that from Holyhead to Dublin is begun to be earned there. (1)

How far visible.

The resolution in Sir Anthony Earby's case states, that personal property to be rateable, must not only be locally situated within the parish, but *visible* there. Several opinions of the judges in subsequent cases are to the same effect (2), and in determining, whether principal

(1) Rex *v.* Jones, Trin. 47 G. III. ante, 130. (3): but the court did not decide whether these vessels are rateable for profits of the voyage to Dublin where the freight for the outward voyage became due, that being a question which respected only the quantum of the rate. But Mr. J. Lawrence gives the following opinion: "It is argued that this is not local visible property producing profits within the parish: the case, however, states, that the boats are built and repaired at Holyhead; that the masters live there, and there hire the crew. There is no other place besides Holyhead and Dublin to which it can be pretended that these boats belong: but though there were the same poor laws in Dublin as here, I do not see how the boats, under these circumstances, could be rated there; though even that would only affect the quantum of the rate. It is said, however, that to make any property rateable in any parish, it must be *permanent* in that parish and produce a profit there; and that this property is only made productive by going out of the parish. The same argument applied, however, with equal force in the case of the King *v.* White, where it was overruled. But why may not this property be said to be productive in the parish? The contract for the passage-money from Holyhead to Dublin is made at Holyhead, and there is an inchoate inception of the voyage there: and that from Dublin is actually paid at Holyhead where the contract is completed. At any rate this objection, if it could have any place at all under these circumstances, would only go to the quantum; though at present I think the boats would not be rateable at all in Dublin."

(2) Rex *v.* Canterbury, 1 Const. 140. Pl. 174. Rex. *v.* Andover, Cowp. 350.

money

money in the custody of the owner was rateable, Mr. J. Buller relies upon it as an argument in the negative, that the rate must be confined to visible property, yielding profit in the parish (1). But other judges have found it difficult to affix a determinate meaning to the term, visible property. (2)

That it must be to a certain degree visible, or more properly perceptible, is manifest, since, otherwise the parish officers will be unable to support by competent proof, that the property which they have rated is actually possessed (3). But there are several kinds of property which are liable to the rate, and yet not generally and sometimes not even the possible subject of ocular inspection. Thus Lord Kenyon observes, "it is said that "only property which is *visible* should be rated; but I "think that is carrying the rule of exemption too far; "for oblations and other offerings which constitute the "rectorial or vicarial dues, are rateable." (4)

Owner must inhabit.

To render personal property rateable, it is also necessary that the owner should inhabit within the parish where it is situate. Lord Mansfield defines visible property to be something local in the place where a man inhabits, adding the qualification of residence by the owner to what is implied by the term local, as applied to the thing to be rated (5). Upon this principle it has been decided, that ships which lie in a parish where the owner does not reside cannot be assessed there, although he has a warehouse and counting-house in the parish (6), and they are registered

(1) Rex *v.* White, ante, 188. n. (2).

(2) Lord Mansfield, Rex *v.* Ringwood, Cowp. 326.

(3) Per Lord Kenyon, Rex *v.* White, 4 Term Rep. 771.

(4) Rex *v.* Carlyon, 3 Term Rep. 385.

(5) Rex *v.* Ringwood, 145. n. (3). See also Rex *v.* St. John's Maddermarket, ante, 141.

(6) W. H. appealed against a rate wherein certain ships of his were rated in Liverpool. He did not live in Liverpool at the time, but held a warehouse and counting-house there, in which no one slept, and for which he

registered there; for that does not make the owner an inhabitant for the purpose of being rateable. (1)

he was rated, and the ships were registered in L. and stated in the register to belong to that port. The court said that the sessions had found that the appellant was not an inhabitant of the parish of L., but had not found that the ships rated were locally within the parish, but only within the port which might be more than co-extensive with the parish, and that it was only on one or other of these grounds on which the rate could be supported. Lord Kenyon, C. J. however seemed to think that the appellant was not rateable under these circumstances, for that a person might be deemed an inhabitant for some purposes and not for all. And he observed that the 43 Eliz. did not direct that personal property should be rated *eo nomine*, but the persons themselves inhabitants according to their ability, which can only be known in respect of personal property, which is of a fluctuating nature, by stating the account of debtor and creditor, and taking the surplus only as the criterion of that ability. (*a*)

Upon a case reserved it appeared that the defendants did not reside at Hull, though they had a counting-house there. It was stated that the defendants were owners of the ships, and that the ships were locally within the parish at the time of the rate, and were registered there: it was contended that this was the home of the ships, and that the personal presence of the owners was not necessary. The court had great doubts upon the statement of the case as well on the question of inhabitancy, which they seemed to think negatived by the case, as also upon the defect of the case in not shewing that the owners derived any benefit from the ships within the parish of H. They seemed to be of opinion that the mere fact of being registered at H. could not make them rateable there; vessels being sometimes rated in places not their proper home: and that it was not considered of any weight in Rex *v.* Liverpool. They observed also that the case did not state that the ships in question terminated their voyage at H., or that the owners received any profit there; without which they might on the same ground be rated at every place where they touched in the course of their voyage. (*b*)

(1) Rex *v.* Collinson, Ibid. 3 Burn. Just. Edit. 20. p. 930. and the principle of the decision explained Rex *v.* Jones, Trin. 47 Geo. III. 8 East, 451.

(*a*) Rex *v.* Liverpool, 8 East, 455. n.

(*b*) Rex *v.* Collison and Taylor, Ib. See Rex *v.* Howard, 44 Geo. III. the same question again came on, and it seemed that it was necessary to state that the ship was locally within the parish at the time of the rate, Ib.

CHAPTER XII.

Of the Principles upon, and Proportions in which the Rate is to be made.

Rate on actual value.

THE sums raised for the poor's relief should be assessed upon the productive value of all property occupied in the district for which the rate is made, for the tax has reference to the present local ability and situation of those who are to pay it. A parish therefore cannot have a standing rate, neither should an old one be confirmed, for the proportions must vary with the fluctuations of property (1). It will be bad, likewise, if made according to the land tax (2). Also if two districts of a parish agree that each shall contribute to maintain the entire poor in a certain proportion, and act under it for a long period, yet it will not be binding, if upon enquiry it appears that the contributions are unequal in the present state of the parish (3). But the assessment in the old rate may be a good reason for making one similar in the new, unless there is some increase or decrease of value. (4)

1. Rate on product of labour.

It has been already shewn (5), that the pecuniary ability of each district arises from three sources: 1st, The product of labour; 2d. Of capital or personal property; and, 3d. Of real property, such as lands, houses, and the like. It has been also stated, that the first species of property is not directly assessable. (6)

(1) Rex *v.* Audley, 2 Salk. 526.
(2) Rex *v.* Clerkenwell, Fol. 12.
(3) Per Lord Kenyon, Rex *v.* Newell, 4 Term Rep. 266.
(4) Rex *v.* Wrexham, 1 Const. III. Pl. 134.
(5) Ante, p. 142.
(6) Ibid.

Personal

Personal property, with reference to this statute, is defined by Lord Mansfield, "the surplus of a man's "estate and effects, after payment of debts, the mainte- "nance of his family, and necessary expences (1)." But it has never been decided, whether such indefinite quantums, as maintenance and necessary expences, can be deducted. 2. On personal property.

Analogy to the tax of subsidies in use when the 43 Eliz. passed (2), and the manner in which the poor's rate is imposed on real property, imply that it is to be levied on the clear profits of the productive subject, without further drawback. Lord Kenyon seems also to have considered, that the sole question necessary to determine its rateability is, "whether or not it produced a profit, or "was liable to incumbrances equal to the value of the "property itself." (3)

The principles upon which this kind of property should be assessed, have not been settled by judicial decisions. But it is laid down, that if a person be rated for stock in trade, and virtually submits to his assessment by not appealing against the rate, it is *primâ facie* evidence, that he is assessable in the ensuing year to the like amount (4). It has been likewise remarked, that personal property is not to be rated at random, or the party left to get off as he can; but the officer making the rate, must be able to support what he has done by evidence. (5)

It may be observed on this subject, without the guidance What deductions

(1) Rex *v.* Shalfleet, 1 Const. 130. Pl. 171. There may be often great difficulties in ascertaining the true quantum of profit as in rating stock in trade. Per Lord Ellenborough, C. J. Rex *v.* Agar, 14 East, 261.

(2) Ante, 142.

(3) Rex *v.* Dursley, 6 Term Rep. 53.

(4) Rex *v.* Darlington, 6 Term Rep. 468. See also Rex *v.* Brograve, 4 Burr. 2491.

(5) Per Lord Kenyon, citing the opinion of Yates, J. Rex *v.* White, 4 Term Rep. 771.

from product of personal property.

of cases, that as the tax is laid upon the net profits, the proprietor is entitled to deduct the prime cost, the expences of clerks, warehouse-room, insurance, and whatever else the tradesman or merchant subtracts, as constituting the difference between the gross and net produce of stock, so far as they operate in diminution of his personal ability to contribute.

It is not settled whether he can deduct the value of his individual labour, upon the same principle which exonerates the profits of personal labour in professions and mechanical trades, or whether it is to be considered as merged in the profits of stock, and rateable therewith. But a trader may subtract the interest of borrowed capital, for it is in the nature of an incumbrance upon the goods (1). Yet he cannot allow interest for his own, because though it forms no part of the net profits of his trade, it is rateable in another shape, namely, as the direct produce of his capital.

Deduction of debts.

It is said, that the total amount of a man's debts (2) is to be deducted, and the tax laid upon the profits of his surplus property. This principle, which is highly equitable, may give rise to some difficulty when it operates in conjunction with another rule, viz. that personal estate is only rateable where it is locally situated. If, on the one hand, no other property of this description is assessable within the parish for which the rate is made than what exists there (3), and if the debts are to be considered, on the other, as following the person, so that their total amount, wheresoever contracted, are to operate not against the entire personal ability of him who is rated, but against his particular local ability in that parish; it

(1) Rex *v.* Dursley, 6 Term Rep. 53.

(2) Rex *v.* Canterbury. Rex *v.* Shalfleet, ante, 144. 4 Burr. 2011. Per Lord Kenyon, Rex *v.* White, 4 Term Rep. 771. See also in Rex *v.* Liverpool, ante. 191.

(3) Ante, 188.

gives

gives a great advantage to those whose property is distributed in several districts.

Thus, for example, if the person to be taxed has 100,000l. distributed in ten several parishes, and resides in all, viz. 10,000l. in each, and his total debt amounts to ten thousand pounds; this debt operating to its full amount in every parish, and the 10,000l. property which he has in each parish, being the whole of what is rateable there, he escapes from the tax in all, though possessed of a clear personal estate of 90,000l. yielding an annual return. But if this 100,000l. is situated in one parish, he is rateable for the profits of 90,000l. which is the real amount of his property, deducting his debts, and constitutes his personal ability.

Difficulty of rating personalty.

Personal property is not usually rated. It is difficult to ascertain its actual amount, unless by using those arbitrary means, which are neither provided by the poor laws, nor permitted by the spirit of our constitution. Sometimes, a fair disclosure of his effects is supposed to injure a commercial man, and he would rather chuse to submit to the imposition of an exorbitant assessment, than seek redress at the hazard of his credit. These, and other reasons, have induced most parishes to refrain as it were by common impulse, from assessing personal property since the 43d Elizabeth. Its liability is no longer questionable; but the apprehension of mischievous consequences has usually prevented its being rated even in manufacturing countries, where the omission presses upon the landed proprietor with considerable hardship.

3. Rate on real property.

The fund for maintaining the poor is therefore chiefly raised by a pound rate upon real property. It seems as if some judges had at one time thought, that in rating this species of property, regard should be had

to the general condition and ability of the occupier, as well as to its actual value, in the same manner as takes place in rating personal estate (1). Such a principle of rating would vary the amount of the tax according to the number of the occupier's family, his debts, and other circumstances, upon which his ability to contribute to the maintenance of the poor usually depends. But this opinion, if it ever was adopted in practice, seems to have been long since abandoned (2), and real property is now assessed upon the principle, that *the tax shall be imposed on the actual productive value of the particular subject at the time of making the rate, whether that is more or less than what it had been when the former rate was made.* (3)

If a house to day is let for 30l. per annum, and to-morrow, if turned into a shop, would let for 50l.; when it is turned into a shop it shall be rated at 50l. (4) If a person has a small piece of land in the heart of a town, which is only of small value, and he afterwards build on it, he must be rated to the poor upon its *improved value* with the building upon the land. (5)

Mode by which value increased immaterial.

The circumstances and manner in which that property became so valuable are not to be considered (6); whether the person rated occupies as proprietor or lessee, he can obtain no abatement from the actual value, because increased by his improvements, however beneficial they may be to the parish, permanent in their nature, or laudable in their object.

(1) Anon. Comb. 479. And see Lord Mansfield's observations, Rex *v.* Uffculme, ante, 68. (2)

(2) See ante, 68. and the cases cited in the notes.

(3) See the opinion of De Grey, C. J. Kemp *v.* Spence, 2 Black. 1245. and of Lord Mansfield, C. J. Rex *v.* Gardner, Cowp. 84. Rex *v.* St. Luke's, 2 Burr. 1153. (1)

(4) Per Buller, J. Rex *v.* St. Nicholas Gloucester, Cald. 262.

(5) Per Lord Kenyon, C. J. Rex *v.* Mast, 6 Term Rep. 154.

(6) Per Ashhurst, J. Ibid.

Thus where a gentleman had durchased an estate, which he kept in his own possession, and rendered of greater value by various improvements, it was held by the court of king's bench, that he must be rated according to the improved, and not the original value or first cost. (1) Improvements.

So where it appeared that a farm was let on lease at a reserved rent, which was then its annual value, and neither fine nor other premium or consideration was paid to the landlord, beside; but during the progress of the term, the farm rose in value beyond the rent. It was thought a question too clear to admit of argument, that the rent was not conclusive evidence of the value, but that the farmer must be rated according to the actual improved worth of what he occupied. (2)

More difficulty arises in determining by what method this present value is to be ascertained. In the case of lands and houses, the rate is usually imposed in one of three ways: 1. Upon the actual rack-rent, when they are in the hands of a lessee. 2. On a supposed rent formed on valuation; which is done where they are occupied by the proprietor, or by a tenant who pays less rent than the premises are worth. 3. On an annual per centage calculated upon the purchase money, with a just allowance for necessary outgoings. 3. Modes of rating lands and houses.

All these modes of valuation proceed upon the assumption, that the rack-rent is the criterion of that actual value upon which the tax is laid: but this principle is fallacious; rent being only so much of the actual value as the tenant can afford to pay his landlord, deducting the expence of cultivation, and a reasonable remuneration for 1. On the rack-rent.

(1) Rex *v.* Mast, ante, 196. (2) Rex *v.* Skingle, 7 Term Rep. n. (5). 549.

trouble and time. The rent therefore is the landlord's profit, the reasonable remuneration is the tenant's profit. Both come from the land, and form parts of its productive value. When land is occupied by the proprietor, he receives both these profits; when it is demised to a tenant, they are divided.

Deductions thereon.

Deductions for expences of labour and capital necessary to render the subject productive, should be considered in both cases as drawbacks upon the profit, and due allowance should be made, upon the same principle, for every part of the produce which belongs to another person, and may be rated in his hands; such as tithes. So also if lands, subject to a right of common, are rated in the hands of the proprietor, a deduction ought to be made proportioned to the value of this right, as it takes from him so much of the benefits of the soil (1). But the net produce after these deductions, whether it goes to the landlord in the name of rent, or to the tenant as profit, or to the occupant proprietor who stands in the place of both, is the legitimate object of tax in the hands of him who occupies the land.

Inconvenience of rating by the rack-rent.

If no other property but land was rateable, there seems but one objection to this mode of fixing the rate by the rack-rent; namely, that the tax would fall principally, if not altogether, upon the owner of the inheritance. But as most, if not all kinds of real property are rateable, some mines excepted, this practice produces great inequality, and violates the grand rule of rating, which is, "that "whatever be the proportion of rating in a parish, "whether to the full value or otherwise, the rate must be "equally made on all persons." (2)

(1) Per De Grey, C. J. Kemp *v.* Spence, 2 Black. 1245.

(2) Per Lord Kenyon, C. J. Rex *v.* Mast. 6 Term Rep. 154.

Thus

Thus tithes, coal-mines, tolls, water-works, and saleable under-woods, are assessed according to the net annual amount of profits, deducting all expences: or, in other words, they are rated at their full value: but land, when rated upon the rack-rent, is only assessed according to the landlord's profits, or *minus* the productive value, by whatever the farmer's profit amounts to. As to tithes, &c.

Let it be supposed, by way of example, that the fair principle for dividing the annual produce of a farm between landlord and tenant, is, that after deducting all expences, each should take one half, and that the annual average of this moiety is the rack-rent stipulated to be paid; it is obvious, that if the farm is assessed upon its rent, the occupier is rated only for half the actual value of the land, while the clergyman, and those who occupy tolls, coal-mines, &c. are rated at the full value of the property, or in a two-fold proportion.

But the principle is still more unequal when applied to buildings. In general they yield no direct profit to the tenant. The rent therefore is the total annual produce; but as buildings are subject to decay, the rent should be divided into two parts; one to be laid by for the purpose of repair, or, in other words, to reproduce the capital, which has been expended on a perishable subject. This portion is not assessable, because capital is not directly taxed to the poor's rate. The remainder is the annual produce of the capital thus originally laid out, and is the only fair object of assessment. A house, therefore, yielding a certain rent, is, by this method, not only assessed more than what land yielding the same rent is, but so much more as the sum amounts to, which the proprietor ought to lay by out of his rent, for the reproduction of his capital. 2. As to houses.

Such a division is nearly made by the landlord and tenant, when the latter agrees to make those substantial repairs which he would not otherwise be compellable to do. Where that takes place, the rent paid to the landlord is the true profit which should be taxed, the tenant not being rateable for these repairs, although they are in effect a rent payable to the landlord in kind. But where the landlord is to make these repairs, and receives in consequence a greater rent, an adequate deduction should be made on that account, and the occupier assessed only for the residue.

3. By a per centage.

Calculating a *per centage* on the purchase money, hath this advantage in common with that of calculating upon the rack-rent, viz. that where the price is fairly disclosed, the mode of ascertaining the rate is certain. But as the clear rack-rent is always the ground upon which the price of land is calculated, it is at best but another method of rating upon that rent. It is indeed more fallacious, as it must be taken upon a fixed standard of rent, when that which is actually paid may fluctuate from innumerable causes. A further objection may be made, where both are practised, namely, that they introduce into the same parish three distinct modes of valuing the same species of subject in the same rate: 1st, That of price when an estate is bought; 2d, Of rent where it is farmed; and, 3d, Of valuation as to the fair rent, where it is occupied by the ancient proprietor, or by a tenant paying less rent than it is worth.

Independent of these objections to rating by a *per centage* on purchase money (which applies to all cases, even where the fee is acquired), it is in its nature more inaccurate than a tax imposed on the fair annual return; for it ascertains the value upon the judgment or good fortune of the purchaser, instead of the actual worth of the thing. The rate is diminished in proportion as the real value exceeds the price paid, and increased in the same

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ratio where it is less: thus taking the burthen from him who has made a lucrative bargain, to impose it upon him who has made one that is unprofitable.

But if an interest short of a fee is purchased, this mode of calculation becomes more complicated, and is therefore in danger of being still more fallacious.

Of ascertaining the actual value for a particular rate.

Where it is agreed that the entire profits shall be rated by whomsoever enjoyed, it still remains to settle how they are to be ascertained.

According to strict theory, the rate should be raised upon the actual value of the taxable subject during the period for which, according to reasonable intendment, the sum levied will supply the poor.

If this principle was pursued, the farmer (supposing the rates to be made half yearly) would be assessed at a higher proportion during autumn, in which his harvest is gathered, than in spring, when his land is more expensive in its cultivation, and less productive in return. The owners of houses at watering places would pay more during the season in which the influx of occasional sojourners increases their receipts, than when the town is left to its usual inhabitants.

But the application of a theoretical principle must be limited by the convenience of society, or it defeats the object for which it is introduced. The natural deficiencies and diversities of the human senses and intellect, and the variety of avocations and habits of those upon whom it devolves to make the rate, render it impossible for practice to follow to its utmost verge, that clear and steady outline which is marked out by the eye of speculation. The period for which the fund raised shall last is uncertain, as it depends upon the uncertain demands

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of the poor. The incessant investigation of parish officers cannot always lead to an unerring conclusion, and the expences of litigation would exceed any benefit which might result from a more accurate assessment, if it could be attained.

On annual average value.

The best method therefore seems to be, that the annual value of the property should be assumed as the foundation of the assessment. That value also should be estimated not according to the productive return of the particular year in which the rate is made, but according to the fair average thereof, as compared with other lands in the parish of a similar quality. Thus lands cultivated with saffron (1), hops, or teazel, which do not yield an annual crop, should be taxed upon a yearly average struck between the producing and unproductive years; lands sown with grass, corn, or such roots and vegetables as give an annual return, should be assessed upon the same average annual value, without reference to the crop of the particular year. (2)

It seems likewise that the value is to be calculated, deducting only the fair annual expences necessary to render the property productive. (3)

(1) See Watson *v.* Tryon, 2 Gwill. 828.

(2) That this is the correct mode of making a rate, see Rex *v.* Mirfield, 10 East, 219. ante, 132. Per Lord Ellenborough, C. J. Rex *v.* Agar, 14 East, 156. post. 205. n. (2).

(3) "It is not enough in those "cases," [i. e. the exemption of property from assessment as not being productive] "to shew that the ex- "pences laid out in any particular "year absorbed the profit of that "year, for the benefit of such ex- "pences may be derived in future "years, as is often the case with im- "provement of farms. If valuable "land in the neighbourhood of a "town be covered with buildings in "one year, the expences of that "year would probably exceed its "profits, but the lands would not "cease to be rateable on that "account." Per Lord Ellenborough, C. J. Rex *v.* Agar, 14 East, 264.

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One objection may be reasonably made to this mode of calculating the tenant's profit of land. It is not founded upon what he actually makes, but upon what it is supposed that he ought to make, according to sober principles of calculation, having respect to the actual state and condition of his farm. It makes no allowance for the difference of industry, skill, and capital, in different farmers. Objection to this mode of valuing.

An assessment on the rent is exempt from this inconvenience, for such deductions would be made from the tenant's profit, which was not included in the rate when laid upon the rent. But in neither methods is there any allowance for extraordinary deficiencies, from the calamities of a particular season, or the accidental failure of crops.

A scrutiny of this sort would lead to all that difficulty and inconvenience, which is felt in rating personal property. Extraordinary contingencies must always give rise to particular relief; but the most effectual remedy against the general objection, will be found in making the valuation moderate; rather below than at the rate of profit which a tenant usually receives. This will compensate for any accidental excess of the rate beyond its due proportion, in which, as it can rarely occur, the occupier will rather acquiesce, than risk the expence and trouble of an appeal. If by these means also some persons are in a slight degree under rated, it will be such as deserve the bounty, by rendering their farms more productive than those of their neighbours, through superior skill or activity.

It has been already seen, that the rate is to be made upon the present value, and has no reference to speculative improvements, or the possible application of property to a more lucrative purpose.

And

Premises falling in value.

And as the value, if enhanced, should be rated; so due allowance should be made where it is lessened, annihilated, or altered, by culture or neglect, by pulling down ancient buildings, or erecting new ones, for that is no injury to the parish, though the taxes thereby become heavier to the rest of the parishioners (1). But where land has found an actual value, which is afterwards diminished by the *voluntary* act of the occupier for *his particular pleasure*, it seems doubtful what deduction he should obtain on that account.

Profits of pleasure-grounds.

It is unreasonable that men who from opulence are enabled to devote considerable portions of their land to gardens, hot-houses, deer-parks, and other pleasureable purposes, should not be rated according to the actual value of the same extent of land in the same parish of similar quality, which the farmer devotes to the more beneficial object of providing articles of the first necessity for mankind. The principle already stated, that the rate is to be imposed upon the average annual value, and not the particular produce of the land, may apply in some degree, but not so strongly as it does to the instances of saffron, hops, and teazel which have been mentioned. In those cases, the occupier is content to forego the profits of one or two years, in order to receive them with advantage in the second or third. But pleasure grounds are

(1) Per De Grey, C. J. Kemp *v.* Spence, 2 Black. 1245. By injury the chief justice means legal injury. It is also observed by Lord Mansfield, "If land undergoes any alteration, the assessors must take all the circumstances into their consideration when they are about to fix the value. It would be an absurd rule to say, that lands not covered with houses should pay the same as they did when the houses were standing upon them. The rates must be according to the value of the thing to be rated; and the duties increase according to the increase of agriculture or improvement. Rex *v.* Gardener, Cowp. 84. See also Rex *v.* St. Luke's, 2 Burr. 1053. where His Lordship seems of opinion, that if the owner of lands suffers them to be barren and unoccupied, they are not liable to be rated. Rex *v.* Bedworth, ante, 159. n. (2)

not

not laid out with a view to a profitable return to the occupier at any time.

The principle is thus laid down by Lord Ellenborough, C. J. upon a question of rating the trustees of a Methodist chapel: "No doubt the fair average expences ought to be allowed in estimating the quantum "of the rate, but not any extraordinary expenditure "which might happen to make the property unprofitable "in a particular year: for where it is the subject of "annual value, the money so laid out in one year will "produce profit in the subsequent years. The mode of "estimating the quantity of profit may be attended with "difficulty. It may be asked what profit was received "in the case of Catherine Hall (1), when the masters and "fellows had pulled down several houses and converted "the scites of them into an area for ornament; it may "be said that they had it in pleasure." (2)

Of tolls and water-works, &c.

In taxing other hereditaments, such as tolls, water-works, and coal-mines, of which the produce is tolerably certain, the profits of the last form a fair ground to estimate those of the rising year, unless reasons are given to increase or reduce it.

Uncertain profits.

But there is difficulty in cases where the profits are dubious, and the amount uncertain, inasmuch as they are rateable notwithstanding (3). Such are the ranger's profits from the king's park; for the rate is prospective (4), and the thing is rateable only when it produces profit (5). The assessment must therefore be either made on past profits, contrary to the manner of rating lands and tene-

(1) Rex *v.* Gardner, Cowp. 78. ante. 196.
(2) Rex *v.* Agar, 14 East, 262.
(3) Jones *v.* Maunsell, Doug. 302.
(4) Durrant *v.* Boys, 6 Term Rep. 580., and see 17 G. 2. c. 38. s. 12.
(5) Lord Bute *v.* Grindall, 1 Term Rep. 333. 2 H. Black. 267.

ments;

ments; or else those which are accruing must be estimated by the average production of former years.

The rate must be proportionate on different kinds of property.

In pointing out the inconvenience of rating real property by the rack-rent, it has been shewn that the value of each kind of property should be justly estimated, not only with reference to its own species, but with regard to all other kind of property existing in the parish, and included in the rate. The same principle applies equally to a rate on real and personal property where the latter is assessed.

Dalton lays it down, that the most reasonable way of taxing land is according to a pound rate; and where personal estate, as goods, money, &c. are taxed, it ought to be in the same proportion as the land, *viz.* the value of every hundred pounds at 5 *per cent. per annum.* (1)

But as the actual value of different species of property may be affected by very unequal drawbacks on the ground of necessary expenditure, and as the general return of profit varies in different parts of the kingdom, no such rule can be laid down with safety as applicable to all parishes. (2)

The relative value of houses and lands in the same parish, vary with local circumstances, even where the rent is the same, for (as has been already stated) some drawbacks of expence may diminish the annual value of the one, which do not affect the other.

K. B. will not presume relative inequality.

The court of king's bench will not presume that a rate is unequal; yet they will interfere and quash one, when framed upon an erroneous principle, and the inequality

(1) Dalton, Just. 123.

(2) Rex v. Sandwich, Dougl. 562.

is

is self evident on its face (1). But a mere difference in the proportional assessment of lands and houses, or of real and personal property, will not induce the court to infer inequality, or intermeddle with the peculiar province of the quarter sessions, who are to judge of the equality of the rate. (2)

Thus the court of king's bench sustained a rate which appeared by the title to be made "upon all occupiers of "lands, at three-fourths of *the yearly value* of the lands, "and upon all occupiers of houses, at the rate of one "moiety of the yearly value of their respective houses." For though the yearly value might mean the clear yearly value after all deductions, in which case the rate would be unequal, it may with propriety mean the yearly rent without these deductions, in which case it will not be manifestly unequal, and the court ought to put such a construction upon the title of the rate as will make it good. (3)

So where it appeared by a case stated, that a rate was made upon real property, by assessing a moiety or half part of the rack-rent or yearly value of farms; and upon personal, by taking the 20th part of the stock, personal estate, or money out at interest, and valuing the interest of such 20th part at and after the rate of 4 *per cent. per annum*, and then rating one moiety of such 20th part equally, or as near thereunto as may be; this is not such an inequality as will induce the court to quash the rate (4). Likewise, where it had been customary to make a distinction in the proportion of the rate between

(1) Rex *v.* Audley, 2 Salk. 526. Rex *v.* Brograve, 4 Burr. 2491. S. C. Rex *v.* Lakenham, 1 Const. 116. Pl. 140.

(2) Rex *v.* Weobly, lb. 102. Pl. 135. Rex *v.* Barnstable, Fol. 26. and the cases, n. (1).

(3) Rex *v.* Brograve, supra, n. (1). The reason, as given here, is made out of both reports, which are not very clearly stated.

(4) Rex *v.* Hardy, Cowp. 579.

farms,

farms, which were assessed at 1d. in the pound, and dwelling-houses and cottages only three farthings in the pound; the court of king's bench, on a case stated, affirmed the judgment of the sessions confirming a rate which assessed them all equally at the rate of 1d. in the pound (1), and the next year confirmed their order for quashing one in the same parish, because made upon the ancient principle of different proportions. (2)

When K. B. will quash for it.

But, on the other hand, it was decided in one case, that where the relative proportion which one species of property bears in value to another, is stated to be the foundation of the assessment, and is grossly and manifestly unequal, the court of king's bench will quash the rate. Thus where a rate was made upon a moiety of the yearly value or rack-rent of the real estate, and a 40th part of the interest on the personal, calculated at 4 *per cent.* they quashed the order of sessions confirming the rate on the ground of apparent inequality, although the quarter ses-

(1) Rex *v.* Butler, Cald. 93.

(2) Rex *v.* Sandwich, Doug. 562. In this case Lord Mansfield lays it down, that "the proportion in which "lands and houses respectively con-"tribute, must ever depend upon "local circumstances; and if nine-"tenths of the burthen arise from "the houses, such circumstance was "sufficient to influence the judg-"ment of the court below in adjust-"ing that proportion." This latter position, that the particular species of property which gave rise to the greatest burthens upon the rate, should be taxed in a higher proportion, seems never to have been followed. It is laid down more equitably in the following resolution of the judges of assize, 1683: "35. Qu. If a pa-"rishioner, or owner within a parish, "do bring into the parish (without the "consent of the parish) a stranger of "another parish, which is, or ap-"parently is likely to be burthensome "unto the parish, how may they ease "themselves?

"Resol. By taxing such a one to "the charge of the rates of the poor, "not only having respect to his abi-"lity, or the land he occupies, but "according to the damage and danger "he bringeth to the parish by his "folly." Dalt. Just. tit. Poor, c. 73. p. 237. ed. 1727. and see Sir Nicholas Hyde's opinion, lb. 225.

But neither rule seems sanctioned by practice, or by any determination.

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sions had found in a special case that this mode of rating contained a relative equality.(1)

Rates on a portion of the value.

It has never been expressly decided whether a rate must be made upon the full value of the property in the parish, or whether it may be laid upon a portion of that value, such as two thirds or one half, provided the relative proportions of value are preserved in all. It appears, however, in the cases just cited, and in some others, that such rates have been questioned upon other grounds, and sustained, without any objection made on this account. Such a practice is collaterally supported likewise by the opinion of Lord Kenyon, who says, "whatever the "proportion of rating in a parish, *whether to the full* "*value or otherwise*, the rate must be equally made on "all persons (2)," putting it hypothetically that a rate, though not made upon the full value, may be good if relatively equal. There is in reality no difference in respect of the assessment, which ever method is pursued; whether the same sum is raised upon one half, or upon the entire property, the calculation in the pound must increase or diminish in the inverse *ratio* of the sum upon which the fund is calculated.

(1) Rex v. Sellers and others, Inhabitants of Lackenham, ante, Cald. 522.

(2) Rex v. Mast, 6 Term Rep. 154.

CHAPTER XIII.

Of rating Parishes in Aid.

43 Eliz. c. 2. sect. 3. within the hundred.

THE poor are to be sustained by parochial districts in the first instance; but they may sometimes be too numerous and burthensome for a particular parish to support. The 43 Eliz. c. 2. sect. 3. provided therefore, that if the justices perceive that the inhabitants of a parish are unable to levy among themselves sufficient sums of money for the purposes of the act, the said two justices shall tax, rate, and assess as aforesaid, *any other* of other parishes, or out of any parish, within the hundred where the said parish is, to pay such sum and sums of money to the churchwardens and overseers of the said poor parish, for the said purposes as the said justices shall think fit.

Out of it.

But if the said hundred shall not be thought by the said justices able and fit to relieve the said several parishes unable to provide for themselves as aforesaid, then the justices of the peace at their general quarter sessions, or the greater number of them, shall rate and assess as aforesaid, *any other* of other parishes, or out of any parish *within the said county* for the purposes aforesaid, as in their discretion shall seem fit. (1)

By two justices within the hundred.

Whenever there is any person or parish within the hundred in which the parish unable to maintain its poor is situate, of ability sufficient to supply the deficiency, the rate in aid is to be made by two justices. They have

(1) The power is given to justices of limited jurisdictions, by 43 Eliz. c. 2. s. 8.

power

power to determine the inability of the parish which applies for assistance, and the capacity of those upon whom they make an order to contribute. Reported cases furnish no rules to guide their discretion in this particular further than that in one parish, where the rates amounted to 25s. in the pound, and were gradually on the increase, and the parishes called upon to contribute were moderately assessed, it was taken for granted at the bar to be a case in which two justices might interfere. (1)

In aid of a vill.

According to the words of the statute, this rate could be made only in aid of a parish; but it has been determined, that since the 13 & 14 Car. II. chap. 12. one may be likewise made in favour of a vill which maintains its poor, as being within the equity of the act. (2)

Made upon a vill, or extra-parochial place.

But although it was doubted whether a vill which sustained its proper poor, could call upon other districts to contribute, it is evident from the words of the act, that a vill (3), or tithing (4), or extra-parochial place (5), which is within the hundred, and of competent ability, may be rated in aid of a parish unable to support its poor.

Justices may rate within what is substantially an hundred, though called by another name.

The jurisdiction of two justices extends not only over an hundred, when so denominated expressly, but also over any other division which is called by a name synonymous or equivalent, as being equally within the intention of the act, although it uses the word "hundred" only.

(1) Rex *v.* Holbeach, 4 Term Rep. 778.

(2) Anon. fol. 25., which was the case of two vills within the same parish, and an order upon one to contribute to the other. Per Lord Kenyon and Buller, J. Rex *v.* Holbeach, sup. n. 1. See also a case of two *parishes* incorporated by 32 Geo. III. c. 99. and one rated in aid of the other. Rex *v.* St. Helen's, Worcester, 2 East, 417.

(3) Ib.

(4) Rex *v.* Milland, 1 Burr. 576.

(5) Rex *v.* Clarendon Park, 16 Vin. Abr. 431. Rex *v.* Boroughfen, Fol. 37.

Thus, where two justices made an order for rating the tithing of Milland, in aid of the parish of St. Peter's in the same county, which was confirmed at the sessions, who stated upon their order, "that the tithing of Milland "lies in the same liberty of the soke with the said parish "of St. Peter's;" it was objected in the court of king's bench, that it does not appear that the places are within the same hundred, as required by 43 Eliz. c. 2., for liberty and soke are vague terms, not equivalent to the known legal term "hundred," and a liberty may extend into several hundreds. The court sent the case back to the sessions to be more particularly stated: but it appearing on the return to be substantially an hundred, though called by another name, they confirmed both orders. (1)

But not where no hundred,

But two justices can make no order in aid of parishes upon places where there are no hundreds or equivalent divisions. Such an order setting forth that the two parishes were within the county of the city of Norwich, without stating that they were within the hundred, was quashed for this defect. (2)

or the poor parish out of their jurisdiction.

Neither can they rate a parish within their jurisdiction in aid of one that is not, although both are situate within the hundred. As where a rule called upon two justices for the county of Worcester, to shew cause why a mandamus should not issue, commanding them to tax and assess some parish within the hundred of Half-Shire, within the said county, in aid of the inhabitants of that part of the parish of Dodderhill which lies in the borough of Droitwich, in the said hundred and county, to the support of their poor. It appeared on the affidavits, that part of the parish is within the borough and part without,

(1) Rex v. Milland, 1 Burr. 576.

(2) St. Benedict v. St. Peter's, 11 Mod. 269. fol. 43.

but

but that both are within the hundred of Half-Shire, and the county of Worcester. It was admitted, that the borough of Droitwich is an exclusive jurisdiction, with a non-intromittant clause as to the justices of the county, who therefore had no authority to enter the borough (1). That the part of the parish of Dodderhill within the borough, had immemorially maintained its own poor, and had distinct overseers, and was at present unable to maintain its poor. But the court discharged the rule, being of opinion that the magistrates had no jurisdiction to do what was required of them.

For the section of the act says, "that if the justices "perceive that any of the inhabitants of any parish are "not able to levy among themselves sufficient sums, &c. "the said two justices shall and may tax, rate, and assess "any other of other parishes," &c. Having the allowance of all assessments, and the superintendance of the overseers' accounts, the legislature presumed, that the justices would have the means of knowing the necessities of all the parishes within their jurisdiction. But they cannot have an opportunity of knowing the circumstances of those districts which lie out of their jurisdiction; and therefore to provide for all cases that might happen, the eighth section of the act was introduced, which gives the same power to borough justices, that was before given to county justices. So that in all cases, the acts of magistrates are to be confined within the limits of their respective precincts.

Where one parish in an exclusive jurisdiction, it is out of the act.

There is one difficulty, indeed, in a case where a borough consists only of one parish. But the argument drawn thence, to shew that the county magistrates must of necessity interfere, proves too much, for there are instances of such towns being counties in themselves; *e. g.*

(1) Talbot *v.* Hubble, 2 Str. 1154. Rex *v.* Sainsbury, 4 Term Rep. 45.

the borough of Caermarthen; but in such a case it is impossible to say that the justices of the adjoining county can interfere. (1)

Rate, on whom made.

When the assessment is judged necessary, it may be imposed in one of two ways: "the justices may tax par-"ticular persons in aid to that parish which cannot re-"lieve its own poor (2); or they may assess the whole "parish in a certain sum, and leave it to the church-"wardens to levy the same on particular persons." (3)

The last is recommended as the least harsh and unreasonable, and is equally applicable to parishes and extra-parochial places. (4)

Justices are to assess the quantum.

The justices are themselves to make the rate, and cannot delegate their power to others. An order of two justices, directing the churchwardens of St. Peter and St. Paul to assess, raise, and levy sixty pounds for the maintenance of the poor of the other parish, was quashed on this account (5). But if they had assessed the particular sum, it would have been good. As where two justices made an order that two parishes in Colchester should pay relief to the poor of a third, viz. the one five

Overseers may collect the rate.

(1) Rex *v.* Holbeach, 4 Term Rep. 778.

(2) Anon. 1 Vent. 250. Skin. 259. Fol. 40. Rex *v.* Boroughfen. 1 Bott, 351. Pl. 433.

(3) Case of St. Rumbald's Parish, Skin. 258. Rex *v.* Eastchurch, 2 Salk. 480. Rex *v.* Boroughfen, Fol. 437. Rex *v.* Knightly, Comb. 309. Rex *v.* Holbeach, ante, n. 1. and per Buller, J. Ibid. The words in the text are given to Lord C. J. Holt, Rex *v.* Eastchurch. But it seems hard, if the rate cannot be made upon the entire ability of the contributing parish, as is done in making its own poor's rate, but that it must in all cases be made upon particular persons. In Rex *v.* Boroughfen, ut supra, the judges were of opinion, that an order on particular persons would be hard and unreasonable, since particular persons of other parishes would be much exposed to the mercy of the justices; and that such a power was hardly to be trusted with them; for they may rate some, and excuse others altogether as well able to pay. But the words of the statute are very strong.

(4) Rex *v.* Boroughfen, Fol. 37.

(5) Case of Parish of St. Peter and St. Paul, 2 Str. 1114.

shillings

shillings a week, and the other eight shillings a week; and that the overseers should collect it. This order was held well enough, and according to the right course; for the justices are only to assess the quantum, and the rate is to be made by the overseers of the poor of the parish. (1)

Form of the order. Sum specified.

The order must therefore state a sum certain (2), and one requiring the contributory parish to make a rate at sixpence in the pound, was held ill for uncertainty on that account. (3)

This contribution is to be made only so long as the inability continues; an order therefore for the parish of St. Peter to pay to the officers of St. Mary, twenty pounds weekly "till we the said justices shall see fit to "order the contrary," is bad; for it may be a perpetual order, which the justices have no authority to make; since, if one of the justices die, or is removed, no other can alter it (4). But if made for a specified sum per week (5), or month (6), or so much yearly (7), or a sum in gross to be levied for the whole year, it is sufficient. (8)

Time specified.

Liability adjudged.

It should appear on the face of the order, that the parish which prays aid of another is unable to maintain

(1) Case of St. Rumbald's Parish, Skin. 258.

(2) Rex *v.* Knightly, Comb. 309. Case of Parish of St. Peter and St. Paul, supra, 165. n. (5)

(3) Rex *v.* Telscombe, 1 Stra. 314.

(4) Case of the Borough of Marlborough, 16 Vin. Abr. 431. 1 Stra. 700. But *an order of sessions*, that the defendant should pay 2s. per week towards the support of his father, till that court should order to the contrary, was held good, because it was indefinite, and no set time limited; and if an estate happened to fall to him, they might apply to the said justices. Jenkin's case, 2 Salk. 534.

(5) Case of St. Rumbald's Parish, supra, n. 1.

(6) Rex *v.* St. Helen's in Worcester, 2 East, 417.

(7) Rex *v.* Little Glen, Comb. 241.

(8) Rex *v.* Knightly, ut supra. 164. n. (2) Rex *v.* Boroughfen, Fol. 37.

its poor; and there must be an assertion and adjudication, that it appeared so to the justices who make it (1). Therefore, where there were two vills in one parish, and the order recited that one of the vills was very rich, and the other very poor, and that the vill that was rich did not pay half so much to the poor as the poor vill did, it was quashed for uncertainty (2). But it need not pursue the very words of the statute, where the allegation is substantially the same. Thus an order of sessions, stating that the parish "*was oppressed*," was adjudged well enough, for it implies inability. (3)

It has been decided also, that it should appear by the order, that the place on which the rate is made is not within the parish in aid of which it is assessed, and that this is necessary, although the names of both appear on the face of the order, and are different (4). So also, that both parishes are within the same hundred. (5)

Several parishes may be rated.

Several persons, who reside in different parishes, or several parishes, if within the same hundred, may be rated at the same time by distinct orders to the relief of the same district. It may be supposed from the expressions used in some cases, that the justices can rate the entire hundred; but what seems meant is, that they may, when necessary, rate every parish, vill, or extra-parochial place, which constitute the hundred, if of ability to contribute, for it is no where distinctly laid down that they can rate the hundred generally *eo nomine*.

(1) Cobbet *v.* St. Mary Lincoln, 16 Vin. Abr. 431. But see case of Borough of Marlborough, 16 Vin. 431.

(2) Anon. Fol. 25.

(3) Rex *v.* Little Glen, Comb. 241.

(4) Rex *v.* Boroughfen, Fol. 36. 1 Barnard. B. R. 2. But query this case? In Rex *v.* St. Helen's, Trin. 42 Geo. III. it was cited to this point, when Lord Ellenborough, C. J. observed, that the diversity of name, imports a diversity of place, unless the contrary is shewn, MSS. And if it were a vill maintaining its own poor, although within the parish, the order would be good if that was made to appear. See ante.

(5) Case of Boroughfen, Fol. 37. St. Benedict *v.* St. Peter's, 11 Mod. 269.

The

The justices, at their general quarter sessions, are to assess any other of other parishes, or of any parish within the said county, where the hundred is unable to contribute to the relief of the incapable parish. They have jurisdiction, not only when the hundred is thus incompetent, but likewise where the place praying aid is not situated within any hundred or equivalent division. Rate, by the sessions.

Thus an order was made by two justices to assess the parishes of St. Stephen and St. Magdalen in Norwich, in aid of the parish of St. Benedict, which was not able to maintain its own poor. It was objected, that the parishes being in Norwich, where there was no hundred, the justices had no jurisdiction; and for this reason the order was quashed. But *per* Powel J., this is not a *casus omissus* out of the statute; and though the two justices have not power, here being no hundred, yet the sessions have a jurisdiction, and may tax the county of the city in part, or at large; to which the rest agreed. (1)

As the power of two justices is confined to the hundred, within which the parish is situate, so the original jurisdiction of the quarter sessions is limited to places out of it. (2)

Therefore, where the sessions made an original order to this effect; "it appearing to this court that the parish "of Dunchurch, in the hundred of Worth, being over- "burthened with poor; and that the parish of Eastbridge, "within the same hundred of Worth, having no poor "relievable within the said parish, it is ordered, that the "said parish of Eastbridge be from henceforth annex- "ed to the said parish of Dunchurch; and that the "occupiers of lands and tenements within the said pa- "rish of Eastbridge be chargeable and contributory to- "wards the relief of the poor of the said parish of Dun- Sessions can't make an original order upon a parish within the hundred;

(1) St. Benedict's v. St. Peter's, 11 Mod. 269.

(2) Per Eyre J. Rex v. Perceval, 1 Str. 56.

"church,

"church, the sum of twenty pounds a-year, so long as the "said parish shall be overburthened, and no poor within "the said parish of Eastbridge." It was moved to quash this order on two grounds: 1st, That it is an original order, which the sessions cannot make; 2d, That justices have no power to annex parishes one to the other, which is in the nature of an act of parliament; and the order was quashed for the first reason. (1)

nor annex one parish to another.

Governed by same rules in making orders without the hundred as justices within.

As the power of assessment is granted to two justices, and to the quarter sessions in the same words, the exercise thereof seems governed by the same rules in both cases; and decisions respecting the former, equally apply to cases occurring under the latter. Thus, where a rate is made by the quarter sessions upon parishes of another hundred than that in which the incapable parish is situated, the parishes within the hundred must appear to be, and must be adjudged by the sessions, unable to contribute.

But they may make their order, "taxing certain pa-"rishes in the hundred of A. in aid of the parish of B. "in the hundred of C.," although two justices have not previously inquired whether any parish in C. can contribute; and this, notwithstanding that the act gives power to the sessions only, if the hundred shall not be thought by the said justices able and fit to relieve, &c. "For the "inquiry would be useless, since, if two justices made "such an adjudication, the sessions must still inquire in-"to the truth of it. If no order appear, charging any "parish within the hundred, it is a sufficient ground "for the sessions to act. If two justices had charged any "parish within the hundred, it would have stopped the

(1) Rex v. Eastchurch, 5 Mod. 397. 2 Salk. 480. According to the report in Salkeld, the court were inclined to consider "so much as concerned the "annexing of parishes void, and the "rest good;" but they took time to advise.

"ses-

"sessions from proceeding. The sufficiency of the hundred depends on this, whether two justices have ever "charged the hundred. *If the said hundred shall not be "thought by the said justices able,* that is, if the two justices do not adjudge it so. If two justices should adjudge the hundred not able, yet if other two justices "adjudge the contrary, their charge would be good, and "the sessions be ousted of their jurisdiction (1), notwithstanding the first adjudication." (2)

Appeal to sessions.

But though the sessions have no original jurisdiction within the hundred, an appeal lies to them from the justices' order, by which its propriety may be questioned.

Case for B. R.

The sessions may state a case for the consideration of the superior court, not only upon any point arising in an appeal, but also where they act by virtue of their original jurisdiction.

...er to appoint, if original order quashed.

And it seems, that if they quash an order of justices, they have power to make a new one within the hundred, in the same manner as they were enabled to make a new parochial rate prior to 17 Geo. II. (3)

Mandamus to make a rate.

Should the justices in or out of quarter sessions refuse to make an order of this kind, the remedy is by application for a writ of mandamus to the court of king's bench; and it is immaterial, although the rule to shew cause command them to rate and assess a particular parish, instead of commanding them to hear the complaint. But the form of the mandamus, if it is granted, should be to compel them to inquire, in the first place, whether the parish stands in need of any assistance, and to act accordingly. (4)

Its Form.

(1) Id est, "original jurisdiction."

(2) Rex *v.* Percival, 1 Str. 56.

(3) Rex *v.* Inhabitants of Little Glen, Com. 241. But the case is reported in a very slovenly manner, as most of the cases upon this part of the poor laws seem to be.

(4) Rex *v.* Holbeach, 4 Term Rep. 778.

To

The return.

To this mandamus, as a writ of right, there must be a return (1), the propriety and truth of which may be examined by the court in the manner already discussed, when treating of the appointment of overseers. (2)

(1) Rex v. St. Mary's in Marlborough. 2 Shaw's Pract. Just. 47. 16 Vin. Abr. 416.

(2) Ante, p. 36.

CHAPTER XIV.

Of levying and distraining for the Poor's Rate.

BY 43 Eliz. c. 2. s. 4. if the rate and all arrearages be not paid voluntarily, present and subsequent church-wardens and overseers may levy them by distress and sale of the offender's goods; and in defect of such distress, he may be committed to the county goal. By 17 Geo II. c. 38. s. 11. succeeding overseers were empowered to levy arrears previously incurred, and to reimburse their predecessors out of the money levied, such sums as they had expended for the poor's use, and which are allowed to be due to them in their accounts.

43 Eliz. c. 2. s. 4.

17 Geo. II. c. 38.

Before any step is taken to enforce payment under these statutes, the rate must be lawfully demanded (1). And if the person liable should die after such demand, and before further proceedings, it seems the better opinion and safer practice to demand it likewise from his personal representatives (2.) If the money is tendered by any

Demand of rate.

(1) Semb. per Holt, C. J. East India Company *v.* Skinner, 1 Bott. 249. Pl. 250. and see post. 172. A summons to appear before the magistrates, may possibly amount to a sufficient demand, if the party attends and refuses payment, or neglects to appear before them. But it is unnecessary to add, that it is more humane at least, to make a previous demand, without which, the Justices do not seem called upon to issue their summons. The form of the warrant of distress in 3 Burn's Just. tit. Poor (Rate), states a demand made before the summons issues.

(2) Stevens *v.* Evans, 2 Burr. 1152. It remains however undecided whether, as the statute gives no authority but to distrain the goods of the offender, the goods of the person assessed to the rate could be charged after his death in the hands of his representatives. Stephens *v.* Evans, when Dennison and Wilmot, J. seemed to incline to different opinions. 2 Burr. 1152. 1 Black. Rep. 284. Wallis Adm. *v.* Hewit, cited Ib.

other

other than the person rated, as by the landlord on his tenant's account, it must be received. (1)

Application to magistrates.

No action of debt will lie for a poor's rate (2), therefore where payment is refused, the overseers should apply to two magistrates of the county or place in which the district is situated for which the rate is made. This is usually done at what is called a petty sessions, which are periodical meetings of magistrates who reside within a convenient extent of country, subject to their jurisdiction, and are held weekly or otherwise for the discharge of such duties as require the conjunction of at least two magistrates to perform.

Justices having property in the parish, empowered to act.

According to the universal principle of the common law, a magistrate who was liable to be rated for property in the parish, was prohibited from acting in its concerns, as being incidentally connected with his private interests (3). But this interest being remote and trifling, and the inconvenience of sending parties from their homes in search of other magistrates very great, the 16 Geo. II. c. 18. s. 1. enables justices to act (among other things appertaining to their office, so far as the same relates to the laws, for the relief, maintenance, and settlement of poor persons) in all matters concerning parochial taxes, levies, or rates, in any parish, notwithstanding that they are rated to or chargeable with the taxes, levies, or rates, within such parish, &c.; but it excepts the power to act in the determination of appeals at the quarter sessions, in matters relating to the parish.

16 Geo. II. c. 18.

It was formerly necessary, that magistrates should not only be in the commission for that particular county or

(1) Rex *v.* Cozens, Doug. 426.
(2) Per Dennison, J. Stephens *v.* Evans, 2 Burr. 1152. 1 Black.Rep. 284.
(3) See post, vol. ii.

place for which they act; but also, that they should be locally present within the limits of their jurisdiction at the time of acting.

Not residing in the county, 28 G. III. c. 49.

But the latter part of this rule is dispensed with, for the purposes of general convenience, by a modern statute (1). Where a justice *acts* for two or more counties, *being adjoining counties*, and personally resides in one of them, any magisterial act of his, done in any one of them, shall be valid as if done in that county to which it particularly relates.

Mandamus.

If the magistrates should refuse to hear the overseers' information or complaint, the court of king's bench will direct a mandamus to compel them to do so (2), or they will grant a criminal information where they have corruptly refused. (3)

If the mandamus is disobeyed, the court will enforce obedience by attachment.

Summons.

When the justices entertain the information, their first duty is to summon the party, or in case of death, his personal representative, to hear them upon the complaint. (4)

This summons should state the nature of the charge, and require the parties to appear at some certain place, and at such convenient time, as is sufficient for them to make appearance and defence (5). It was the practice formerly to grant a conditional warrant in the first instance to distrain in case of non-payment (6); and in a reported case, a mandamus was directed to justices to

(1) 28 Geo. c. 49. s. 1.
(2) Rex *v.* Benn, 6 Term Rep. 198.
(3) Rex *v.* Cozens, Doug. 426.
(4) Rex *v.* Benn, ut supra. n. 2. Stevens *v.* Evans, 2 Burr. 1152.
(5) See the form, 4 Burn's Just. tit. Poor (Rate).
(6) Rex *v.* Broughfen, Foley, 37.

sign

sign a warrant of distress for levying the poor's rate without summoning the party (1). It was conceived, that granting such a warrant was a ministerial act, like the allowing a rate; and that it would be useless for magistrates to call a party before them, and hear a defence which they had no power to allow. Besides this case, many similar writs of mandamus were shewn to have issued from the crown-office in the first instance, neither stating the parties to have been summoned, nor requiring the justices to summon them. But the court of king's bench, upon mature deliberation, disregarded these precedents; because a distress to levy this rate is in the nature of an execution. The justices must, therefore, exercise a discretion of inquiring into the circumstances, and it is of course necessary that a summons to the person who refused to pay should precede it: "For it is an invariable "maxim in our law, that no man shall be punished until "he has an opportunity of being heard; whereas, if a "warrant of distress were to be issued without any pre-"vious summons, the party would have no opportunity "of shewing cause why the warrant should not issue "against him." (2)

As magistrates are civilly answerable where they issue a warrant of distress illegally (3): this rule is not less for

(1) Rex *v.* Justices of Middlesex, 1 Const. 250. Pl. 255.

(2) Rex *v.* Benn, 6 Term Rep. 198. Harper *v.* Carr, 7 Term Rep. 270. The form of the rule for the mandamus, as settled in Rex *v.* Benn, was "To receive such information and "complaints as have been or shall be "duly laid before them, against such "persons as have neglected or refused "or shall neglect or refuse to pay the "same respectively assessed on them "by a certain rate or assessment, made "on ——— last, for the relief of "the poor of ———, in the county of ———, and to proceed there-"upon to levy the said several sums.

(3) Harper *v.* Carr, supra, n. (1). Nutting *v.* Jackson, Loft, 249.

their benefit, than it is for that of the person whose goods are liable to distress, where he neglects to pay his rate.

Service of Summons.

The proceedings before the magistrates being in the nature of a civil execution (1) for the purpose of levying the assessment, personal service of the summons seems unnecessary; and it is sufficient to leave it with some *inmate* of the defendant's at the house where he usually resides. But if the object be to commit him to prison as an offender in default of a distress, it will be the fairest way to serve it personally.

When party does not appear.

The party being thus served, either refuses to obey, or appears in conformity to the tenor of the summons. If he does not appear, or offer such a satisfactory excuse as ought to induce the magistrates to postpone the hearing until another time, the warrant of distress should issue upon proof of service of the summons. But if there be any just reason to suppose that granting the warrant may subject the justices to an action, such as, that the rate is void for any cause; as, for instance, that the place for which it is made is without their jurisdiction; they may require the parish officers to shew that their act in granting the warrant will not be illegal. But they can inquire no further than is necessary for this purpose, since they are civilly answerable in no other cases to persons who may be aggrieved by their warrant.

Causes to be shewn against granting the warrant: 1. Payment.

If the defendant appears, he may shew for cause why the warrant should not issue, any thing which amounts to payment, as, that the sum at which he stands rated has been tendered by him, or by some person on his behalf, and refused, and that he or they are still ready to pay it (2). That he has paid the assessment to one of the parish officers, who has not accounted for it. (3)

(1) Ante, 224.

(2) Rex *v.* Cozens, Doug. 426,

(3) Per Lord Kenyon, Rex *v.* Benn, 6 Term Rep. 198.

2. Nullity of rate.

He may also urge any circumstances which shew the rate to be a nullity, into which the magistrates might inquire of their own accord. Such as, that public notice has not been given of the rate in the church on the *next* Sunday after it was allowed by the justices (1). That the place for which it was made is not within their jurisdiction, or that it is not made for the proper district (2). That the subject for which he is assessed is not by law rateable (3). That he is not liable to the rate, either as not being the occupier at all (4) or as not being a rateable occupier (5). For if the rate is void, those who are rated may treat it as a nullity; and the warrant being illegal where the assessment is so, the magistrates are not compellable to issue one even by mandamus; and the court will not grant the writ for that purpose, since it would be no justification in an action of trespass brought for a distress taken under the warrant. (6)

But not an overcharge.

But no other circumstances can be inquired into at this hearing, excepting such as amount to payment, or prove that the rate is a nullity. The quantum, or any overcharge in the rate, is only to be controverted by an appeal to the quarter sessions. If the defendant omits to dispute it there, he is supposed in legal construction to have acknowledged the propriety of his assessment; neither can the magistrates refuse their warrant, from the party's utter inability to discharge his quota, although it may be a good ground for appealing against a rate made upon him, for personal property. (7)

(1) Rex *v.* Newcombe, 4 Term Rep. 368.

(2) Nicholas *v.* Walker, Cro. Car. 394. Rudd *v.* Foster, 4 Mod. 157. Peart *v.* Westgarth, 3 Burr. 1610. Rex *v.* Justices of Gloucester, cited in Harper *v.* Carr, 1 Term Rep. 270.

(3) Jones *v.* Maunsell, Doug. 302. Lord Bute *v.* Grindall, Term Rep. 338. 2 Hen. Black. 267.

(4) Milward *v.* Coffin, 2 Black. 1331.

(5) Lord Amherst *v.* Lord Somers, 2 Term Rep. 372.

(6) Rex *v.* Newcombe, 4 Term Rep. 368.

(7) Per Lord Mansfield, Rex *v.* Uffculme, 2 Const. 3 Edit. 233. Pl. 262. ante, 68. n. (4)

Formerly, if notice of appeal was given, it took away the magistrate's jurisdiction to distrain until the appeal was either abandoned or decided; but now, by 41st Geo. III. c. 23. s. 1. the justices may proceed to recover by distress, so much only as the person then rated, or any other occupier of the premises was rated in the last effective rate. (1)

Of granting warrant pending on appeal.

The justices do not act ministerially, but have discretionary power to grant or refuse the warrant (2). But where no sufficient cause is shewn against granting it, they must issue it.

The assessments in a legal rate become due from the moment that it is allowed and published; and may be demanded, and the warrant granted before the time has expired for which the rate is made. (3)

When warrant may be granted.

A general warrant of distress is not sufficient (4). It must state specially the name of the person upon whose

Its substance.

(1) The act, which is drawn with great care and accuracy, extends to rates upon personal as well as real property. The former can be laid only on the person, and is comprehended under the first provision, "than the "person so rated shall have been rated "in the last effective rate." But as real property may have been occupied before making the rate appealed against, the act requires the appellant to pay the contribution to which his predecessor submitted or was adjudged liable, and exempts him from an immediate advance of any surplus which may be supposed the fair ground of his appeal. When promises have been rated as an undivided subject of occupation, and are afterwards split into distinct holdings, and there is an appeal against a rate by which they are thus for the first time assessed, it seems as if no remedy was provided for apportioning the rate, or recovering the respective proportions of the old assessment due from each of the new tenants previous to the determination of the appeal; and this would scarcely have been practicable, as the amount of their several quotas may be the ground of appeal.

(2) Per Lawrence, J. Harper *v.* Carr, 7 Term Rep. 270.

(3) Charlwood *v.* Best, 1 Bott, 243. Pl. 234. But it is not usual to express any time in the title of the rate.

(4) Tracey *v.* Talbot, 2 Salk. 531.

goods the levy is to be made, the rate upon which it is granted, and the sum assessed and directed to be levied (1). The sum will either be, 1st, The whole assessment in the rate: 2d, A part of it proportioned to the time of occupying the premises, by 17 Geo. II. c. 38. s. 11.: 3d, Under 41 Geo. III. c. 28. s. 2. in case of notice of appeal the amount of the last effective rate on the person appealing, or upon the premises for which he is assessed: Or, 4th, The sums at which the several parties stand assessed in the amended rate, if the appeal has been heard and allowed before the warrant issues.

Of the time of sale.

By 27 Geo. II. c. 20., in this and all other cases where the justices have power to levy by distress, the warrant must direct the goods and chattels so distrained to be sold within a certain time limited therein, not less than four, nor more than eight days; unless the sum for which the distress is made, together with reasonable charges of taking and keeping it, be sooner paid.

One for two rates.

One warrant may be granted to compel payment of two assessments under different poor's rates due to the same parish by the same person; but it is more prudent to make separate warrant, since, otherwise, if one of the rates be illegal, the warrant which enforces payment of the aggregate sum is bad. (2)

Of the levy.

When the warrant is thus issued, it becomes the duty of those to whom it is directed, to levy under it, and they are alone answerable for their conduct, if it is good in its form, and properly granted. (3)

(1) See the form, 4 Burn's Just. tit. Poor (Rate).

(2) Admitted in Milward *v.* Coffin, 2 Black. Rep. 1330. Patchett *v.* Bancroft, 7 Term Rep. 367.

(3) Hutchins *v.* Chambers, 1 Burr. 579. Newton *v.* Young, 1 New Rep. 187.

As

As to the place in which this levy is to be made, the most obvious is the parish for which the assessment is made.

But where the offender had no chattels within the parish, a levy under the warrant in the adjoining parish where he had goods and resided, was held well, without the help of statute, both parishes being situated in the same county, within the magistrates' jurisdiction. (1)

But now, by 17 Geo. II. c. 38. s. 7. the goods of any person assessed and refusing to pay, may be levied by warrant of distress, not only in the place for which the assessment is made, but in any other within the same county or precinct. 17 Geo. II. c. 38.

If sufficient distress cannot be found in the said county or precinct, on oath made thereof before some justice of *any* other county or precinct (which oath shall be certified under the hand of such justice on the said warrant), such goods may be levied in such other county or precinct by virtue of such warrant or certificate. In a different county.

Any person aggrieved by the distress may appeal to the next quarter sessions of the county or precinct for which the assessment is made, who are required finally to hear and determine the same. Appeal.

And by 33 Geo. III. c. 55. s. 3., in all cases where any penalty, forfeiture, fine, or other money, may by the warrant of any justice or justices of the peace be directed to be levied by distress and sale of the goods and chattels of any person or persons; if sufficient distress cannot be found within the limits of the jurisdiction of the justice 33 Geo. III. c. 55.

(1) Hampton *v.* Lammas, Holt, C. J. Lord Raym. 735.

granting such warrant of distress; on oath thereof made by one witness, before any justice of the peace of any other county, riding, division, city, borough, town corporate, or place, (which oath shall be by him certified by indorsement on such warrant,) such penalty, forfeiture, fine, or other money, or so much thereof as may not have been before levied or paid, shall and may, by virtue of such warrant and indorsement, be raised and levied by the person or persons to whom such warrant of distress shall have been originally directed, by distress and sale of the goods and chattels of such person or persons, in such other county, riding, division, city, borough, town corporate, or place; and the money arising by such distress and sale, shall be applied and disposed of for such purposes, and in like manner, as if sufficient goods and chattels of such person or persons had been found within the jurisdiction of the magistrate originally granting such warrant; and if no such distress can be found, such offender or offenders shall and may be forthwith proceeded against according to law: provided always, that no justice who shall endorse any certificate upon, or authorise the execution of any such warrant of distress which may not have been granted within his jurisdiction, shall be answerable or accountable for any irregularity which may have been committed or done, in or about the obtaining or granting of such warrant of distress.

27 Geo. 2. c. 20.

When the officer executes the warrant, he is required by 27 Geo. II. c. 20. to shew it *upon demand* to the person whose goods and chattels are distrained, and to suffer a copy of it to be taken. (1)

In taking goods under a warrant of distress, the law gives a power in some respects different from that which

(1) See Fletcher *v.* Wilkins, 6 East, 283. Post, vol. 2.

obtains

obtains in distresses made by landlords for recovery of rent.

Goods exempt from distress.

Under the statutes relating to levying a poor's rate, two sorts of things found on the premises of the person distrained are protected from his statutory execution. 1st, Such as are not the actual property of the person rated, and refusing to pay; the act of Eliz. expressly requiring, that the sum due shall be levied by distress and sale "*of the offender's goods.*" But although a transfer of property in them has been made to a creditor, yet if it be done secretly, and the former owner continues in possession, they are to be considered as the property of the actual possessor, and are liable to execution as his. (1)

2d, Things affixed to the freehold, and which therefore do not come properly under the legal denomination of "goods," as they are called by the act of Eliz. or "goods and chattels," as by the subsequent statutes. (2)

Goods partially exempted.

Things in actual custody and use cannot be seized as a distress for rent; such as an axe in a man's hand (3); the horse on which he is riding (4); or the loom that he is working at; since to permit them to be taken away from the possessor, must perpetually tend to a breach of the peace. (5)

And although this point had only been determined with respect to distresses for rent, and not for poor-rates; yet the same tenderness for life, and respect to the intemperate

(1) Edwards *v.* Harben, 2 Term Rep. 587. Barnford *v.* Baron, Ib. n. and see the distinction taken in Kidd *v.* Rawlinson, 2 Bos. & Pull. 59. Bull. N. P. 258.

(2) Gorton *v.* Falkner, 4 Term Rep. 569.

(3) Ibid.

(4) Storey *v.* Robinson, 6 Term Rep. 138.

(5) Ibid.

passions of mankind, seem to require that the protection should extend to them, in the latter case, when there is a sufficiency of other goods on the premises to satisfy the warrant. (1)

Things not privileged.

The goods of the offender are in other respects less privileged, than where the remedy is applied for the recovery of rents. For as things distrained may be sold, the proceeding, though called a distress, resembles more nearly an execution. Things therefore which are holden privileged by common law, at least *sub modo* in the case of rent (2); that is, which are exempt from being distrained upon, while a sufficiency in value of other goods remains on the premises, obtain no such privilege here.

Beasts of plough.

Thus it has been held, that beasts of the plough may be taken as distress for the poor's rate, although there is at the time more than a sufficiency of other goods upon the premises to satisfy the demand (3). Hence it may be safely relied upon as a general position, that all goods, being the property of the person rated, which can be taken as a distress for rent, may be taken also in satisfaction of the poor's rate.

Money, tools, &c.

So money may be distrained (4), or the working tools of a cooper lying in his shop for the purpose of carrying on his trade (5); nay, the very wearing apparel

(1) There is a considerable distinction between the cases of distress for rent, and for a rate. The latter is in the nature of an execution by a warrant granted by a public magistrate, to which the party is bound to pay obedience; but a distress for rent is a summary remedy permitted to the landlord, who is interested in the question. See Anon. 3 Salk. 136. Moyse *v.* Cocksedge, Willes' Rep. 636. Hutchins *v.* Chambers, 1 Burr. 579.

(2) See Gorton *v.* Falkner, 4 Term Rep. 569.

(3) Hutchin *v.* Chambers, 1 Burr. 579. also 3 Salk. 136.

(4) East India Company *v.* Skinner, Ibid. 242. Pl. 230.

(5) Edgecomb *v.* Sparks, 2 Show. 126. Simpson *v.* Martopp, Willes, 512. 3 Com. Dig. tit. Distress, cites Sand. Obs. on S. 22 Car. 2. ch. 1. p. 39. Gorton *v.* Falkner, 4 Term Rep. 569.

of

of his wife and children, if taken while not in actual use; as, when those who wore them are in bed (1). But the officers can not justify breaking by violence into the house, in order to seize the goods. (2)

Goods to be sold, &c.

The goods are to be publicly sold at the time directed in the warrant, unless the sum due, with reasonable charges for taking and keeping the distress, is previously paid.

When sold, the officer who makes the distress is empowered by 27 Geo. II. c. 20. to deduct the reasonable charges of taking, keeping, and selling the distress out of the money arising by the sale; and the overplus, after fully satisfying and paying these charges, and the sum directed to be levied, is to be returned on demand to the owner of the goods and chattels distrained. (3)

Where a second distress.

If the officer does not take sufficient goods by his first distress to satisfy the exigence of his warrant, he may make a second under it for that purpose (4), although he could have taken enough upon his first coming on the premises (5). This is beneficial to the person distrained upon, as it enables the officer to act with moderation and tenderness, in not taking too much, which he must otherwise do in order to secure himself, if he could not come a second time to make good the deficiency (6). On the other hand it seems advantageous to the person levying, since although it has been determined, that a general action of trespass cannot be maintained against

(1) Bisset *v.* Caldwell, 1 Bott, 249. n. a.

(2) Per Lord Ellenborough, C. J. Bell *v.* Oakley and others, Maidstone summer assizes, 1813.

(3) Parish officers might have done so previous to this act where they did not appear oppressive or extravagant, for the distress being in the nature of an execution, the necessary expences of the levy are incidental thereto. Moyse *v.* Cocksedge, Willes' Rep. 636.

(4) Hutchin *v.* Chambers, 1 Burr. 579.

(5) Ibid.

(6) Hutchin *v.* Chambers, 1 Burr. 579.

him

him for taking an excessive distress, where the goods levied upon are of arbitrary and uncertain value; yet the party injured might have a special action against him upon the statute of Marlbridge. (1)

Commit party to prison.

If there should be no distress, the party may be committed by warrant of two justices to the common gaol, there to remain without bail or mainprize, until he discharges the sum at which he is assessed (2); and when it is intended to proceed to this extremity, the summons to appear before the magistrates should be served upon the defendant in person. But no parish ought to take this course, unless by way of punishment, where the defendant has fraudulently concealed or disposed of his goods.

Of payment where the rates is afterwards quashed.

Formerly, if payment was enforced even from those who did not appeal, and the rate was afterwards quashed; the justices who granted the warrant of distress, and the officers who acted under it, were liable to an action of trespass, as having entered the premises of the person distrained upon, and taken his goods without lawful powers; and those who had voluntarily paid their proportion, might in many cases harass the collector by an action for money had and received under a void authority.

41 G. III. c. 23.

These mischiefs were remedied by the act for the better collection of the poor's rates, 41 Geo. III. c. 23. It provides, that when it is necessary for the relief of the persons appealing, the sessions shall quash the rate; but that all and every sum of money charged by such rate on any person, may be levied by such means, and in such manner, as if no appeal had been made against it; and all sums charged therein, which any person charged

(1) Hutchin *v.* Chambers, 1 Burr. 572.

(2) Even for a penny. Moyse *v.* Cocksedge, supra. 233. (3).

therein

therein shall pay, or which shall be levied or recovered from him, shall be taken as payment on account of the next effective rate.

It has been already seen, that the sum at which the person rated and appealing, or any former occupier of the premises, was rated in the last effective rate, may be recovered by distress notwithstanding the appeal, but no more. Sect. 2.

Sect. 4. provides further, in consideration both of those who are to enforce, and those who are to pay the rate, that where it is quashed on appeal, the sessions may order any sum charged in and by such rate, or any part thereof, not to be paid, and then no proceedings shall, after the making such order, be commenced, and if previously commenced, they shall be no farther prosecuted to enforce payment in any sum which shall be so ordered not to be paid. Sect. 4.

Provided also, that no justice, constable, peace-officer, or other person, shall be deemed a trespasser, or liable to any action, for any warrant, order, act, or thing, which such justice, &c. shall have granted, made, executed, or done, for the purpose of enforcing payment, before he shall have *had notice in writing* of the order for non-payment.

CHAPTER XV.

Of ascertaining what Poor the Parish are bound to maintain.

Origin and History of the Law of Settlements.

Of the settlement of vagrant poor.

IT is difficult to trace with precision the law of parochial settlements to its original foundation.

The poor, as regulated by act of parliament, were originally distinguished into two classes: beggars able to work, whom it punished with severity as criminals; and beggars, who being unable to maintain themselves from age or bodily infirmity, were compelled to seek their support from the alms of charity.

12 R. II. c. 7.

The settlements provided for this latter class of unfortunate people, are easily followed through the statute-book. The earliest act directs, that beggars impotent to serve shall abide in the place where they be dwelling at the time of the proclamation of the statute; and if the cities or other towns will not, or may not suffice to maintain them, then they shall draw themselves to other towns within the hundred, or to the towns where they were born, within forty days after the proclamation made, and there shall continually abide during their lives. (1)

11 H. VII. c. 2.

But as it frequently happened that the indigent had, from accidental circumstances, least means of exciting compassion in the place of their nativity, 11 Hen. VII.

(1) 12 R. II. c. 7.

c. 2.

c. 2. conceded to the unfortunate beggar a more ample circuit for the exercise of his fortuitous means of subsistence, by declaring that all beggars shall go and abide in that hundred where last he dwelled, or where he is best known, or born. The restriction to the hundred "where the person was best known," was too indiscriminate to determine any thing, and nearly amounted to a general licence to beg throughout the kingdom. The 19 Hen. VII. c. 12. therefore, limited this vague description, by enacting that they shall go and abide in the city, town, or hundred, where they were born, or else to the place where they made last their abode for the space of three years; and this continued to be the rule of settlement in subsequent statutes passed against vagrancy, in the reign of Henry VIII., his son Edward, and daughters Mary and Elizabeth. (1) 19 H. 7. c. 12.

The 14 Eliz. c. 5. after enacting that the justices shall appoint within their divisions neat and convenient abiding places to settle the aged and impotent poor, for their habitations and abidings; directs, that the mayor of London, and the mayor, sheriffs, bailiffs, and other head officers, of every other city, borough, or town corporate, and the constables, or tithing men of the several hundreds within all and every the said shires in England and Wales, in all and every such abiding places within their hundreds, limits, and precincts, as shall be appointed *to settle* the poor people in, shall once a month make search of all the aged, impotent, and lame persons within the precincts of their jurisdiction; and all such as they shall find not being born within that division, nor dwelling within the same three years, (except leprose and bedrid people,) shall cause to be conveyed on horseback, cart, 14 Eliz. c. 5.

(1) 22 H. VIII. c. 12. 27 H. VIII. c. 25. 1 Ed. VI. c. 3. 3 & 4 Ed. VI. c. 16. 5 & 6 Ed. VI. c. 2. 1 & 2 P. & M. c. 5. 5 Eliz. c. 3. 14 Eliz. c. 5. 18 Eliz. c. 3. See all these statutes collected in Dr. Burn's History of the Poor Laws, chap. 4. p. 60. ed. 1764.

or

or otherwise, to the next constable, and so from constable to constable, till they be brought to the place where they were born, or most conversant by the space of three years next before, and there to be put in the abiding place, or one of the abiding places appointed for the habitation of the poor people of that country.

Removals under vagrant acts.

By the more early of the statutes, the poor were required to remove themselves to the places pointed out for their settlement. This direction was subsequently enforced by the penalty of being punished as vagabonds, when they neglected to obey. But the law of removals directing them to be conveyed thither, as to their place of settlement, in the manner already recited in 14 Eliz. c. 5. was originally established by 1 Edw. VI. chap. 3. The 1 Jac. I. c. 7. made a further alteration, ordaining that rogues, vagabonds, and sturdy beggars, should be sent to the place of their dwelling, if they had any, and if not, to the place where they last dwelt by the space of a year, if that can be known, by their confession or otherwise; and if that cannot be known, then to the place of their birth.

Distinction between rogues and vagrant beggars.

These statutes draw in other respects a wide and proper distinction between rogues and vagabonds, who have recourse to begging in the love of idleness and vice; and beggars who are compelled by decrepitude to glean the necessaries of life from the pity of their fellow-creatures. But they prescribe the same places, viz. cities, towns, or hundreds, for the settlement of beggars of both descriptions, and establish the same criterion of settlement for both; namely, *birth*, and *dwelling* or *inhabitancy* for three years, without regard to the capacity or situation in which they lived there; and placed them equally under the jurisdiction of the justices of the peace.

It

It is evident from reported cases, and the opinions of learned judges, that their sole object was to suppress vagrancy, and regulate the wandering poor who came under the description of beggars.

These statutes apply only to vagrants.

Thus *Flemming* Chief Justice, in a case between Weston and Cowledge, 11 James I. declared, that "young children whose parents are dead, are to be set at work, "relieved, or maintained, at the charge of the town "where they were dwelling at the time of the death of "their parents, and are not to be sent to their place of "birth, &c. For if the parents are not rogues, we "may not make the children rogues except they wander "abroad and beg (1)." So it is held in the resolution ascribed to the judges in the time of Elizabeth: "That "no man is to be put out of the town where he dwelleth, "nor to be sent to his place of birth or last habitation, "but a vagrant rogue; nor to be found by the town, "except the party be impotent (2)." And also, that "such persons *as be of any parish*, and have able bodies "to work, if they refuse to work at such wages as are "taxed or commonly given in those parts, are to be sent "to the house of correction, *and not to their place of "birth or last dwelling*, by the space of a year." (3)

Dalton, when speaking of persons who having had houses, but whose leases are expired, and of servants whose times of service were ended, observes, "that such "persons must not be sent out of the town where they "so last dwelled or served: neither are they to be sent "from thence to their place of birth or last habitation, "but are to be settled there to work, being able of body;

(1) Dalt. Just. tit. Poor. chap. 73. p. 227. edition 1727.

(2) Resol. 9. Lamb. Eirenarch. book 2. chap. 7. p. 209. ed. 1630. Dalt. Just. Id. 227.

(3) 10 Resolution of judges, temp. Eliz. Lamb. Eirenarch. p. 209. Between the vills of Suckley and Whitborn, 14 C. I. 1638, 2 Bulst. 357.

"or

" or being impotent, are to be there relieved: and yet " if such persons shall wander abroad begging out of " that parish, then they may be sent as vagabonds from " the place where they shall be taken wandering or beg- " ging, to their places of birth," &c. (1) So it was laid down by Sir Francis Harvey, that " justices of peace, " especially out of their session, were not to meddle " with the removal or settling of any poor, but only of " rogues." (2)

And where a person could not be removed as a wanderer, it is said to have been the common law as far back as from the time of the Mirror, that the parish was to maintain him when actually chargeable. (3)

Of the settled poor.

Parliament seems to have interfered no further respecting the *Settled Poor*, than to provide a fund for their relief. As they neither defined nor enumerated the circumstances, which should constitute a settlement, and draw a distinction between the resident inhabitant, and the wanderer or vagrant, it becomes difficult to trace the period at which

(1) Dalt. Just. Ibid. 228. Parish of Hardingham *v.* Parish of Brisley, Mich. 1649. Styles, 168, 2 Bott, 306. Pl. 345.

(2) Summer assizes at Cambridge, 1629. Eod. Dalt. 228. Lord Hardwicke, however, seems to intimate a contrary opinion, where he observes, " And though the notion of settlements of poor persons had not obtained at the time when the act of 5 Eliz. c. 4. was made, as it has done since, yet it was a mistake of one of the counsel to say, that the 33 Eliz. was the first act relating to the settlement of poor persons; for 27 H. VIII. c. 25. which is printed in Rastalle's edition of statutes at large, establishes a settlement for such as have been born or dwelt three years in any parish: there was a subsequent statute 1 Ed. VI. c. 3. But, indeed, the present notions of settlements have taken their rise from 13 & 14 C. II. c. 12. St. Nicholas *v.* St. Peter's, Burr. 5. c. 91., 2 Const. 370. Pl. 401. See also the opinion of Gould, J. Steel *v.* Houghton et Ux. 1 H. Black. 56.

(3) Per Foster, J. Rex *v.* Aythrop Rooding, Burr. S. C. 412. 2 Bott, 474. Pl. 493. By Gould, J. Steel *v.* Houghton et Ux. 1 H. Black. 57. But the opinion of Lord Mansfield and Dennison in the first case, and also that of Lord Loughborough in the last, seem contrary.

those criteria which are now held to ascertain it were first established.

By an old law, "a stranger, or he who cometh guest-"wise to an house, and there lieth the third night, is "called an *Hogenhyne* or *Agenhine;* and after the third "night, he is accounted one of his family in whose "house he so lieth (1)." And Minshieu, verb. *Hogenhyne & uncouth*, saith, that *uncouth* signifies *incognitus*, and is used, in ancient Saxon laws, for him who cometh to an inn guestwise, and lieth there two nights at the most; and that by the laws of Edward, and of the Conqueror, *hospes trium noctium*, if he did any harm, his host was answerable for him as for one of his own family; and that if he tarried any longer, then he was called *Hogenhyne* or *Agenhine*, that is, *familiaris*. So that it seemeth in those times, that to lodge in a place for three or four days together, was counted a settling. (2)

But this law appears to have been made not for the purpose of ascertaining the poor man's settlement, but as a wise measure of police and general security. (3)

The first regular definition of lawful settling, other than what is declared by statute for vagrants and beggars, is in the resolutions of the judges of assize in 1633, which state, that "the law unsettleth none who are lawfully "settled, nor permits it to be done by a practice or

(1) Terms de la Ley, voc. Hogenhine. Secundum antiquam consuetudinem dici poterit de familiâ alicujus qui hospitium fuerit cum alio per tres noctes; qui primâ nocte dici poterit Uncouth; secundâ, Gust; tertiâ nocte Hogenhine. Bract. de Leg. fol. 124. b. But in Bar. observ. on the statutes, it is said to be the Saxon appellation for a villain, p. 234.

(2) Per Fortescue, J. Rex v. St. Peter's in Oxford, Fol. 193, 2 Bott, 275. Pl. 317. Opinion of Lee, C. J. Rex v. Sowton, Burr. S. c. 128, and of Gould, J. Steel v. Houghton et Ux. 1 H. Black. 55.

(3) 1 Black. Com. 114.

" compulsion; and every one who is settled as a native, " householder, sojourner, an apprentice, or servant for " a month at the least, without a just complaint made to " remove him or her, shall be held to be settled." (1)

It seems further, that it must be an inhabiting with the purpose of making the place an home. For it is laid down in the same resolution, that " a nurse child, or " scholar at the grammar school, or at the university, or " persons sent to the common gaol; hospital, or house " of correction (being impotent), are not to be esteemed " as persons to be settled there, *more than travellers in* " *their inns;* but their settling is *where their parents are* " *settled;* and children born in common gaols and houses " of correction, their parents being prisoners, are to be " maintained at the charge of the county." (2)

So in a question of settlement submitted to Sir William Jones and Sir James Whitlock, judges of assize in 1629, prior to the date of these resolutions, it appeared that a woman having young children, and travelling from A. to E. died in B. an intermediate parish, leaving her children there: the judges were of opinion, that the children were settled in the place of their birth, and not where the mother died *in transitu.* (3)

(1) See C. J. Hult's opinion, Weston Rivers *v.* St. Peter's Marlborough, 2 Salk. 492. 26 Resol. of Judges of assize 1633. Dalt. 23. Dalton recites it thus, p. 289. " Every one " who is settled as a native, an house- " holder, sojourner, an apprentice, or " a servant retained for one month," &c. This seems to confine the month's residence to the case of a servant, an explication of which the original resolution seems capable, see post. 249. et seq.

(2) 32 Resol. eod. Dalt. 337. Per Cur. Taking a boarder to school will not make him an inhabitant, for he has his maintenance elsewhere; the same of a nurse child; one put to board is no sojourner within the act; sojourning is the act of a free mind, but putting to board, perhaps, is not. Rislip Hendon and Harrow, Fort, 311.

(3) 2 Bulst. 351.

A person

A person who became a settled inhabitant by any of these means, could not be removed unless by his own act, and if he afterwards became impotent and poor, he was entitled to relief from the parish funds. Relief of persons settled.

The district from whence the fund for maintaining the poor was raised, almost of necessity determined the limits within which those for whose use it was levied, and by whose officers it was administered, should be accounted settled. The fund for the poor's relief was ordained to be collected by parishes and placed under parochial administration and superintendance, by 27 Hen. VIII. c. 25; but the 14 Eliz. c. 5. seems to be the first statute in which the term, settling poor people is made use of. The poor's rate, however, was directed to be raised by parishes, and placed under the control of parochial officers in the time of Queen Elizabeth, from whence it may be safely concluded that the origin of parish settlements is to be referred, either to her reign or to that of her father(1). It is observable, indeed, that the legal decisions and opinions already cited, although of a later date, use the word "towns," in reference to settlements; but it is plain that it is considered as a denomination synonymous with "*parishes.*" Settlement by parishes.

Although a person thus settled became part of the local poor, and entitled to relief; yet if he departed voluntarily, and turned vagrant, he was liable to be removed under the statute to the place of his birth, or last dwelling

(1) The 22 Hen. VIII. c. 12. impowered justices to grant licences to beg in a hundred, city, borough, parish, liberty, or franchise, within the limits of their division, and directed that if they begged any where else, they should be sworn to return to the place where they be authorized to beg. The 27 Hen. VIII. c. 25. cited above was passed to provide how the poor should be ordered on their coming to the hundred, and how the hundred should be charged for their relief. It imposed the duty of maintaining the wandering poor upon cities, shires, towns, hundreds, hamlets and parishes; but it imposed the penalty for neglecting to do so, viz. 20s. a month, upon parishes only.

for three years (1). So that the obligation to relieve might cease with the continuance to dwell in the parish. For the person removing might have resided more than a month, and less than three years; and could not, if he became a vagrant, be removed thither again.

But a class of cases occurred, which were neither provided for by the statutes against vagrancy, nor by the law of settlement as it is here explained.

Relief of persons removing, who were not in a state of vagrancy.

Persons, not in the state of wandering poor, might be compelled, from the urgence of accidental necessity, to ask relief in places where they were not settled. Such as children within the age of nurture, left by the death or desertion of the father or mother in a parish where they were not born, nor their parents settled; persons taken suddenly ill, when travelling from one place to another in pursuit of their lawful avocations; or who, after removing for the purpose of gaining an honest livelihood in another parish, became actually chargeable, before their settlement was complete.

Hence a question arose between parishes, upon whom the maintenance of poor persons thus circumstanced should fall; whether they were to be removed to the place of settlement appointed for vagrants; or to that of their last settlement as inhabitants: or whether they were to be maintained as casual poor, in the parish to which they had thus become suddenly a burthen.

First determination.

The first general resolution upon the subject seems to have been made by Sir William Jones and Sir James Whitlock, in the case already cited from Bulstrode (2):

Birth or last habitation.

"that the place of their birth, or the place of their last

(1) Suckley and Whitborn, 2 Bulst. 357.

and 2 Bulst. 350. Margaret Brown's case, 27 Car. 1. 1631.

(2) 2 Bulst. 351. See ante, 242.;

"habitation,

" habitation, if the same may be known, are in judgment " of law said to be the places of settling; so that if one " be born in such a place and parish, and afterwards is " an inhabitant in service in another place and parish, " and after this he becomes to be a wanderer, he is here " by the law to be sent to the last place of his settling, " to be there kept and provided for."

This resolution refers to the case of wandering poor, and speaks of a settlement by residence to which the removal should be made; but it does not specify whether it could be gained by residence for a shorter period that is prescribed by the statutes against vagrancy.

But they also resolved, " that an infant under the age " of seven years shall not be said to be a wanderer;" and they sent the children, being infants, whose mother had died *in transitu*, from the parish where they were found at their mother's death, to the several parishes of their births, " as poor to be by them provided for, but not as " wanderers, rogues, or vagabonds."

Settlement by service.

This point appears to have been more expressly decided a few years afterwards in the court of king's bench. An inhabitant in the parish of B. hired a maid-servant by covenant; she fell sick some time afterwards, and her master turned her out without giving her any thing; and the maid for necessity, in travelling from B. towards H. where she was born, was forced to beg for relief; whereupon she was sent as a vagrant to H.; the vill of H. sent her back to B. whereupon B. procured an order of sessions to settle her at H. where she was born.

The question was, whether this was a good order or not, for settling her at H. according to the statute; or whether she ought to be settled at B. where she was entertained as a covenant servant, and turned out of service, and forced to beg by that means? And *Rolle* Chief Justice

said, that there seems to be a fraudulency in the master to make his servant a vagrant, that so he may be rid of her: but if one beg meat and drink for necessity in passing between one town and another, this is not begging to make one a beggar within the statute: and therefore the court ordered that the party should be settled at B. where she was entertained for a covenant servant, and not at H. where she was born. (1)

So also in a case not long subsequent to 13 & 14 Car. respecting an application for the relief of a poor child, it was resolved by Pemberton C. J., Dolben, and other justices, 34 Car. II. "That no notice can be here taken "respecting the birth of the children, but of their last "settlement, by 43 Eliz. c. 2. because they are only poor "children and not vagabonds; but they which are rogues "or vagabonds within 39 Eliz. c. 4. shall be provided for "by the place where they were born." (2)

These cases go some way to shew, that prior to 13 & 14 Car. II. the obligation to relieve impotent and settled poor, continued not only while they remained in the parish, but after leaving it, until they became vagrants, or had acquired other settlements. (3)

Power to remove whence.

But it is difficult to point out the origin of the power of removal in such cases, as it seems to have been exercised by justices of peace prior to 13 & 14 Car. II. which gives it expressly. That of removing vagrants and common beggars was created by statute. Ever since 14 Eliz. c. 5. persons of this description were transferred to their parish under pass warrants, which consigned them from constable to constable, in the same manner as vagrants are passed at this day. Magistrates would have to determine

(1) Paroch. de Hardingham *v.* Paroch. de Brisley, Mich. 1649. Sty. 268.

(2) Sir T. Raym. 477.

(3) Suckley *v.* Whitborn, 2 Bulst. 357. & ante, 244.

in all cases when they were called upon to grant relief, whether it was asked by a person who was necessitous from casualty, or by a beggar and vagrant. But whether the practice arose from a liberal interpretation of these statutes; or crept into use from justices not having originally attended to the distinction pointed out by the act, but regarding every person asking parish relief as a common beggar; or whether it originated with the magistrates in sessions by reason of their appellate jurisdiction over the parish rate and overseers accounts; or in what other mode it commenced, or to what extent it was exercised, is no where expressly laid down.

But it is to be observed, that it has been held not to extend to extraparochial places. (1)

A poor man might be fairly supposed to retain his situation of a settled inhabitant in a particular place, although quitting it for a season, until he parted with the character, either by settling somewhere else, or by indicating a resolution to abandon all permanent residence when he turned vagrant. As soon as it became a question, whether one thus circumstanced should be maintained by the parish in which he was so settled, or by one to which he became chargeable by an accidental calamity, it must have appeared more conformable to the statutes regulating the wandering poor, and to natural justice, that the former should be held liable; and it was not unreasonable to conclude, that a power to remove to the place which lay under this obligatory duty to maintain him, was impliedly given by the creation of the duty itself.

(1) Post. vol. ii. chap. 29. sect. 2. In Scotland also where the poor laws correspond in a great degree to what ours were prior to 43 Eliz. c. 2. the law of removals, as practised with us, is unknown, and the poor are entitled to receive relief from their place of settlement, though living in another parish, as is the case of children within the age of nurture in this part of the kingdom.

This seems to have been the opinion of Lord *Holt*, who in laying down that there is no power of removing to or from an extraparochial place, observes that, per- "sons in extraparochial places must subsist on private "charity, as all persons did at common law before 43 Eliz. "which enacts that every parish shall keep their own poor, "*in consequence of which the jurisdiction of removals was "first set up before the statute of* 14 *Car. II. c.* 12. for un- "less the poor were removed to their own parishes, every "parish could not maintain their own poor." (1)

Also in another case it is observed by the same great judge: "Before 13 Car. II. two justices removed by consequence of law upon 43 Eliz., because that statute makes a provision that every parish shall maintain its own poor; therefore the justices considered who were properly the poor of the parish, and they were held to be such as were there settled a convenient time, which was thought a month, so that a month's abode made an inhabitant." Still there remained several doubts which occasioned 13 & 14 Car. II. c. 12." (2)

Some points respecting parish settlements which were not touched by 13 & 14 Car. II. seem to rest even now upon the law as it stood before that statute passed. Such are the settlement of natural children born in gaol, or in hospitals, or pending an order of removal (3); that of servants residing, during sickness, in a different parish from their masters (4). Indeed every settlement gained in right of marriage or parentage, and also removals by reason thereof, and possibly settlements on tenements of 10l. a year, or by estate, depend equally upon the antecedent law, as not being within the letter of the statute.

(1) Dean *v.* Linton, 2 Salk. 487. See also 2 Rulst. 357.

(2) Weston Rivers *v.* St. Peter's Marlborough, 2 Salk. 492. It is observed by Rider, C. J. that the 13 & 14 Car. II. c. 12. first created the right of settlements in parishes. Rex *v.* St. Botolph, Bishopsgate, Burr. S. C 367. 2 Bott, 84. - Pl 123.

(3) Post. chap. xix.

(4) Post. chap. xx.

But

But the doubt, if it did exist, is removed in other cases, by the 13 & 14 Car. II. c. 12. which recites in the preamble the grounds upon which it passed. 13 & 14 C. II. c. 12.

"Whereas, "by reason of some defects in the law, poor people are "not restrained from going from one parish to another, "and therefore do endeavour to settle themselves in those "parishes where there is the best stock, the largest com- "mons or wastes to build cottages, and the most woods "for them to burn and destroy; and when they have "consumed it, then to another parish, and at last become "rogues and vagabonds, to the great discouragement of "parishes to provide ſtocks when it is liable to be de- "voured by strangers: be it therefore enacted, by the "authority aforesaid, that it shall and may be lawful, "upon complaint made by the churchwardens, or over- "seers of the poor of any parish, to any justice of the "peace, within forty days after any such person or per- "sons *coming to settle* as aforesaid, in any tenement under "the yearly value of ten pounds, for any two justices of "the peace, whereof one to be of the quorum of the "division, where any person or persons that are likely to "be chargeable to the parish shall come to inhabit, by "their warrant to remove and convey such person or "persons to such parish where he or they were last legally "settled, either as a native, householder, sojourner, ap- "prentice, or servant, for the space of forty days at the "least, unless he or they give sufficient security for the "discharge of the said parish, to be allowed of by the "said justices."

Construction of the act.

This statute adopts the very words used in the 26th resolution of the judges of assize in 1633, as to the modes of gaining a settlement, but alters the time of residence by which it may be acquired from "a month at the least," to "forty days at the least." It places vagrant beggars on the same footing with other impotent poor, in respect to the methods of acquiring a settlement; and puts it beyond doubt,

doubt, that the settlement gained is to continue until a new one is acquired. It gives power to justices of peace in all cases of removal and settlement, and prevents a settlement being acquired by the mere act of residence for a month, without being chargeable, as might have been done previously; for it enables two magistrates to remove not only those who become chargeable before they have resided for the space of forty days, but such as they shall in their discretion deem likely to become so, unless they give security for the discharge of the parish.

Prior to this statute, no one could be removed unless they were in a state of vagrancy, or had become actually chargeable to some other place than that of their settlement. But this act regards all persons of an inferior condition who change their habitation as vagrants and vagabonds, unless they come to reside upon a tenement of 10l. a year value. Lastly, it gives a right of appealing to the next quarter sessions, to those who are aggrieved by the order.

The following weighty reasons are assigned by Dalton against the policy of this act: "it is well worthy the "consideration of wise law makers to consider whether, "notwithstanding the specious allegations in the said act's "preamble, it may not be prejudicial to the common-"wealth. For that, 1. By the words *likely to be chargeable*, "too great a scope is given to any person, although never "so just and prudent, to inspect, and to determine ano-"ther man's livelihood and condition. 2. A man with-"out his offence is barred of his natural liberty, and "upon a possibility remote enough, may be made a beggar "and a prisoner, at the same time deprived of the com-"pany of friends and relations, choice of air, and place "of trade. 3. It tends to the discouragement of in-"genuity and industry; for why should any one learn

"or

" or endeavour to be excellent in any handicraft, which " he is likely to make small use, and smaller benefit of. " 4. Places and persons are deprived of the labour and " industry of others. 5. It tends to depopulation, which " is the greatest inconvenience an island can un- " dergo." (1)

(1) Eod. Dalt. 231. But see these inconveniences remedied to a certain extent, 35 Geo. III. c. 101. post. 253. Dr. Burn, both in his history of the Poor Laws, chap. 4. and 5., and in the introduction to his title " Settlement," 3 Burn's Justice, has in my apprehension, misconceived the origin and history of settlements, which has induced me to enter more fully into the subject than I should otherwise have done; besides which, it may not prove unsatisfactory to ascertain those foundations upon which, much of the law of settlements rests at present.

CHAPTER XVI.

Of the several Kinds of Settlements, and General Rules which govern them.

A PLACE of settlement may be defined a district maintaining its poor, to which persons become removeable for the purpose of obtaining the relief given by 43 Eliz. c. 2.

Settlements by 13 & 14 Car. II. c. 10.

The several methods of acquiring settlements in such a district, as enumerated by 13 & 14 Car. II. c. 12. are residence as a native, householder, sojourner, apprentice, or servant for the space of forty days. So that a person who remained in any parish unremoved for that time, gained a settlement in whatsoever capacity he resided: for the justices were not only without power to remove, except within the first forty days, but the act expressly acknowledges a residence for that period, even as a sojourner, to constitute a legal settlement. From the short space of time given for removal, and the small notoriety with which residence might be attended, the burthen of large families was frequently thrown upon parishes, without possibility of redress or power of prevention. To remedy this inconvenience it was enacted by 1 Jac. II. c. 17. that the forty days residence should be reckoned, not from the time of a person's first coming to inhabit, but from that of his giving notice in writing to some one of the parish officers of his place of abode, and the number of his family.

Notice by 1 Jac. II. c. 17.

By 3 W. III. c. 11.

The collusion or inattention of parish officers rendering this provision also inadequate to the supposed mischief, it was further provided by 3 W. III. c. 11. that the forty days should be reckoned from the publication of such notice in the parish church, by which means every inhabitant

inhabitant must or ought to receive information of the fact.

Settlements requiring residence.

If no exception had been made to this general provision, all persons to whom a residence for forty days was necessary in order to obtain a settlement under 13 & 14 Car. II. must have complied with the formality of notice and publication. But the legislature saw that this provision might affect particular classes, who not coming into the parish clandestinely, were not within the mischief against which it was meant to guard, and with respect to whom the provision would be nugatory, as there was no power to remove them after notice given. For these reasons, the following classes of inhabitants were altogether exempted from the necessity of publishing notices: 1. Unmarried persons not having a child, who shall be hired for a year. 2. Apprentices bound by indenture. 3. Persons paying their share towards the public taxes or levies of the town or parish. 4. Persons on their own account executing any public and annual office or charge in the said town or parish during one whole year.

35 Geo. III. c. 101.

The 35 Geo. III. c. 101. rendered persons irremoveable until they become actually chargeable to the place they inhabit; and of necessity abolished, by express provision, the mode of acquiring a settlement by notice and residence. Otherwise a person of sufficiency to maintain himself and family for the space prescribed by the statute, might have rendered the notice an unavailing formality, and the party giving it must have gained a settlement in defiance of the wishes and vigilance of the parish.

Settlements by public taxes abolished.

But all persons exempted by 3 W. III. c. 11. from the necessity of giving notice, continue to gain a settlement by residence for forty days in any of the capacities which are

are there enumerated, except being rated to and paying public taxes in respect of a tenement which is not of the yearly value of 10l. that being likewise abolished by 35 Geo. III. c. 101.

Other settlements.

The scope of 13 & 14 Car. II. was to suppress vagrancy in the lower ranks of society, and there were other methods of becoming a settled inhabitant in use before the statute passed, which that act left to the operation of the antecedent laws.

1. Persons who come to reside on a tenement of the yearly value of ten pounds, are expressly exempt from removal by the act itself. 2. Persons who come to reside upon their own estate have been held so, as not being within the mischief it was designed to remedy (1). For they do not intrude into the parish as strollers and vagabonds, nor come with the bad intentions mentioned in the preamble (2). By the common law, no man can be removed from his own (3); and the right is under Magna Charta, that none shall be disseised of his freehold. (4)

40 days. residence.

But it was necessary by the old law, that the person who migrated from one parish to another should be a settled inhabitant to be entitled to relief; and it has been shewn that he must reside there for a limited period in order to become so. In 1633, a month's residence seems to have been sufficient (5); this might have increased into one for the space of forty days, previous to 13 & 14 Car. II. It does not appear whether such was the case, or whether the enactment of that statute was considered as

(1) Harrow *v.* Edgeware, 2 Bott, 465. Pl. 485: and the several cases cited under title, Settlement by Estate, post. chap. xxiv.

(2) Per Yates and Wilmot, J. Rex *v.* Uttoxeter, Burr. S. C. 538. 2 Bott, 479. Pl. 497.

(3) Per Wilmot, J. Ib.

(4) Per Foster, J. Rex *v.* Aythorp Rooding, Burr. S. C. 412. 2 Bott, 474. Pl. 412.

(5) Resol. of Judges of Assize 1633, ante, p. 241.

affording

affording an inference, that the legislature intended to make a residence for that time necessary, wherever it is at all required; but a residence for forty days, is now held to be necessary in these as well as in cases of settlement more strictly within the letter of the act.

Besides these methods of acquiring settlements, in which residence is necessary, there are some in which it is not.

Settlements where residence is unnecessary: 1. Birth.

The place where the individual is born is as it were pointed out by nature, and acknowledged by every statute which regulates the subject, as one in which he is accounted settled by the mere circumstance of birth. (1)

2. Marriage.

If the settlement of the husband and wife were distinct, it would defeat the object and law of their union; her civil existence is merged in his; she becomes by marriage an inseparable part of his family, and cannot be removed from him, against his consent, but must be settled where he is.

3. Parentage.

The law, with the same observance of the social principle, casts the first duty of watching over the child's education and providing for its support upon the parents. Children, during pupilage, form natural parts of that family of which the father, and upon his decease the mother, are the head; to disjoin those whom nature and policy had thus united, would be equally inconve-

(1) The words of the 26 Resol. of Judges 1633, and of 13 & 14 Car. II. seem at first view to imply that there should be a residence; according to the resolution, for a month; and the statute for 40 days, in the parish where the individual is born, in order to confer a settlement: but they have been considered as applying not to the original birth settlement, but to cases where, after that settlement is destroyed by the acquisition of one in some other parish, the party returns to his native parish, and resides there forty days.

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nient and cruel; and the law preserves the œconomy of private families, in holding that the parents settlement, is communicatad to their legitimate offspring, until they are emancipated. (1)

1. Derivative Settlements.

1. These several enumerated methods of acquiring settlements, may be divided into two general classes; 1. Such as are communicated without a residence of forty days; which may be called derivative, or natural settlements (2); and are, 1. marriage; 2. parentage; 3. birth.

2. Acquired Settlements.

2. Where a residence of forty days is necessary, which may be called acquired settlements: and are gained, 1. *By inhabitancy* as an hired servant; 2. as an apprentice; 3. serving an office; 4. where a person has a tenement of ten pounds a year value; 5. where he has an estate. 6. where he pays a share towards the public taxes or levies of the parish, other than as excepted by 35 Geo. III. c. 101.

General rules.

Previous to treating in detail of the several kinds of settlements, it may not be improper to mention two general rules which are to be attended to by magistrates in making orders of removal, and determining appeals.

First, A subsequent settlement always destroys that which is previously acquired by the same person, and contending parishes are to look to this as the only means by which a settlement once actually gained can be defeated. "A man cannot give away, or release or suspend his settlement; for the public is concerned in it, as well as himself." (3)

(1) See 26 Resol. of Judges 1633. ante, 242.

(2) Rex v. St. Matthew's Bethnal Green, Burr. S. C. 482. 2 Bott, 37. Pl. 59.

(3) Per Rider, C. J. Rex v. St. Botolph's Bishopsgate, Burr. S. C. 367.

The

The second is, that no settlement can be legal which is brought about by practice or compulsion. (1)

(1) 26 Resol. Judges 1633. Dalt. 236. 3 Burn's Just. tit. Poor (Settlement). And see Missenden *v.* Grimsfield, Fol. 157. 2 Bott, 390. Pl. 416. But this rule does not apply to the case of settlement by marriage, where the marriage continues good: at least during the life of husband and wife, and while they live together. See post. p. 259. n. 7.

CHAPTER XVII.

SECT. I. *Of Settlement by Marriage.*

Husband's settlement

WHEREVER a woman intermarries with a man who has obtained a known settlement, it is communicated to her, although she has never been where it is gained. (1)

supersedes his wife's,

And every succeeding settlement that he acquires is in like manner transferred to her immediately. Wherever the husband therefore has a settlement, that which the wife had previous to marriage is absolutely superseded by virtue of the rule already mentioned (2); and she cannot gain a new one by any act of her own during her husband's lifetime, even by residence upon her own estate, after he has deserted her and his children. (3)

but is suspended if he has none.

But when the husband has no settlement, not being born in England or Wales, nor having acquired one during his residence (4), or which is the same thing, if born there, that which he had cannot be discovered; the wife's settlement is not totally destroyed by marriage, but

(1) St. Giles *v.* Eversley, 2 Sess. Cas. 116. 2 Bott, 81. Pl. 117. Appotens *v.* Dunswell, as reported, Ib. 80. Pl. 116. is contra.

(2) Ante, p. 256.

(3) Berkhamstead *v.* St. Mary North Church, 2 Bott, 33. Pl. 56. Rex *v.* Aythorp Rooding, Burr. S. C. 412. and see Rex *v.* South Lynn, 5 Term. Rep. 664. post.

(4) Rex *v.* Wilsborough Green, Fol. 249. St. Giles *v.* St. Margaret's Westminster, Ib. 83. Pl. 121. Rex *v.* Chidingstone, 1 Str. 683. 1 Sess. Cas. 104. Rex *v.* St. Botolph's Bishopsgate, Burr. S. C. 367. Per Lord Hardwicke, Berkhamstead *v.* St. Mary North Church, ante, (3).

remains

remains suspended during his life, or perhaps more properly during cohabitation. So that if the parties cohabit together and become chargeable, she cannot be separated from her husband, against his consent, although he has no settlement to which she can be removed, and it must fall to the parish in which they dwell to relieve them both as casual poor (1). But if the husband having no settlement, dies (2); or leaves his wife, and it is not known whether he is living or dead (3); or running away, lives separate from her (4); or being unable to maintain her, consent to the removal (5), the settlement she had previous to marriage continues, so that she may be removed thither when chargeable. It is therefore said to be suspended under these circumstances, as being liable to be destroyed if the husband shall gain one subsequently, although he has deserted her (6); or to be revived under the circumstances above stated. (7)

SECT.

(1) Rex *v.* Carlton, Burr. S. C. 813.

(2) Appotens v. Dunswell, 1 Sess. Cas. 80. Rex *v.* Westerham, 2 Const. Ib. 83. Pl. 122.

(3) Rex *v.* Ryton, Cald. 39.

(4) Rex *v.* Wilsborough Green, Gilb. Rep. 79. Rex *v.* St. Botolph's Bishopsgate, Burr. S. C. 367. and the cases cited supra. But Stretton *v.* Norton, Andr. 307. Burr. S. C. 122. is contra.

(5) Rex *v.* Eltham, 5 East, 113.

(6) Rex *v.* Witton cum Twambrookes, 3 Term Rep. 355. The case of a father's settlement gained after deserting his family, communicated to an unemancipated son.

(7) Mr. Const has stated in the digest of his useful book, title Marriage, and in his marginal abstract, Rex *v.* Edwards, 2 Bott, 68. Pl. 100. Rex *v.* Watson, Ib. 70. Pl. 103. Rex *v.* Tarrant, Ib. 74. Pl. 109. That a marriage procured by bribery or any other means, with a fraudulent design to confer a settlement, will do so. He states further in his abstract of Rex *v.* Smith, Ibid, 76. Pl. 113. that "the "marriage of a lunatic, though pro- "cured with the design to change "her settlement, is good." The religion of the country intermixes itself so entirely with the contract of marriage, that when it is once celebrated, all civil rights must follow from it whatever may be the parties motives for entering therein. Although the marriages were brought about, in the first class of cases, by the procurement of parish officers, yet the parties being habiles ad contractandum matrimonium, the nuptial engagement confers upon them and their issue the right of settlement, with all others, that are consequent upon the state. But there

SECT. II.

Of the Proofs necessary to establish a Settlement by Marriage.

Proofs of Settlement.

ALTHOUGH the pauper is removed as a married woman, it will be sufficient to prove in support of the order that her maiden settlement is in the place to which she is removed, and the other side must shew a settlement of the husband elsewhere to get rid of it, and that whether he is dead (1) or living (2). Neither will it make any difference if it appear that the parish proving this kind of settlement have not used due diligence in endeavouring to procure the husband's attendance, or accounting for his absence, or in enquiring as to his settlement, or that he is described in the marriage register as being of another parish, for that is no evidence of his settlement. (3)

But where either the appellant or respondent parish mean to rely upon a settlement by marriage, they must be prepared to prove, 1. the marriage; 2. the husband's settlement.

seems considerable doubt whether the lunatic's marriage would be good, not upon the ground of the overseers having procured it, but of the lunatic's incapacity to contract. 1 Blac. Com. 439. and the cases there cited; also post. 272. None of the cases mentioned by Mr. C. prove either position for which he cites them, they only decide that it is punishable to procure such marriages. The legality of the marriage and settlement seems inferred, because the procurement would not be civilly punishable unless it had thrown a burthen upon the parish, to do which the marriage must be valid. But this position seems inaccurate, for the crime is complete, if the fact by possibility might have put the parish to expence, especially in cases of conspiracy, which all these seem to have been, except perhaps Rex *v.* Tarrant.

(1) Rex *v.* Ryton, Cald. 29. 2 Bott, 649. Pl. 699. Rex *v.* Woodsford, Cald. 236. 2 Bott, 92. Pl. 132.

(2) Rex *v.* Hedsor, Ib. Pl. 135. Cald. 371. Rex *v.* Harberton, 13 East, 311.

(3) Rex *v.* Halberton, ante, n. (2).

Marriage

Marriage is celebrated either by banns or licence (1); which are regulated so far as to effect the validity of the marriage, by 26 Geo. II. chap. 83. By sect 1. all banns of matrimony, where the parties dwell in the same parish, are to be published in the parish church, or a public chapel belonging to the parish, in which banns of matrimony have been usually published, upon three Sundays preceding the solemnization. If they live in different parishes, the banns are to be published in both; and if one or either is an extra-parochial place, then in some church or chapel belonging to an adjoining parish: and in all cases where banns have been published, the marriage shall be solemnized in one of the parish churches or chapels where such banns have been published, and in no other place. 1. Marriage. 26 Geo. II. c. 33.

By the same act, sect. 11. all marriages solemnized by licence, after 25th of March 1754, where either of the parties, *not being a widower or widow*, shall be under the age of twenty-one years, which shall be had without the consent of the father of such of the parties so under age (if then living) first had and obtained, or if dead, of the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and in case there shall be no such guardian or guardians, then of the mother (if living and unmarried); or if there shall be no mother living and unmarried, then of a guardian or guardians of the person appointed by the court of chancery; shall be absolutely null and void to all intents and purposes whatsoever. Sect. 11.

By sect. 12. where the guardians or mother shall be *non compos mentis*, or shall refuse or withhold their consent, then the person desirous of marrying may petition Sect. 12.

(1) A licence for marriage is subject to a 10s. stamp by 44 G. III. c. 98. Schedule (A).

the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal, who may hear it in a summary way; and if they judicially declare by an order that the marriage is proper, it shall be as effectual as if the guardians had consented.

Sect. 4. By sect. 4. no licence shall be granted to solemnize matrimony in any church or public chapel, except those belonging to the parish or chapelry within which the usual place of abode of one of the persons to be married shall be for the space of four weeks immediately previous to their granting such licence.

And if both or either dwell in an extra-parochial place, having no church or chapel where banns have been usually published, then in a parish church adjoining: but by sect. 6. this does not extend to deprive the archbishop of Canterbury of his right to grant special licences to marry at any convenient time or place, pursuant to 25 Hen. VIII. c. 21.

Sect. 10. By sect. 10. after solemnization of a marriage *by banns*, proof of the parties dwelling where the banns were published; or, *where it is by licence*, that the usual place of abode of one of the persons, was for four weeks in the parish or chapelry where the marriage was solemnized, shall not be necessary in support of the marriage; nor shall any evidence in either of the said cases be received to prove the contrary, in any suit touching the validity of the marriage.

By sect. 18. the act is not to extend to Scotland; nor to marriages among quakers or jews, where both parties are quakers or jews; nor to marriages solemnized beyond the seas.

All

All marriages celebrated since the period mentioned in this statute, in England and Wales, must conform to its provisions, or no settlement can be gained in consequence thereof; for the act declares that the marriage shall be null and void to all intents and purposes. (1)

It was further determined by the court of king's bench, with great reluctance, that a marriage regularly celebrated by banns in a chapel, erected since the passing of the statute, and not upon the scite of any ancient church or chapel, was void, and that no settlement could be gained under it. The act expressly referring to churches and chapels in which marriages were usually celebrated at the time it passed. (2)

But this disgraceful consequence of a law of very questionable policy, was remedied by 21 Geo. III. c. 53. which enacted, that all marriages solemnized in any church or public chapel, erected since the passing of 26 Geo. II. shall be as valid in law as if they had been solemnized in churches or chapels, having chapelries annexed, wherein banns had been usually published before or at the time of passing thereof, and that the registers of such marriages shall be received in evidence. 21 Geo. III. c. 53.

Sect. 4. provides, that such registers shall be removed within twenty-one days after 1st Aug. 1781, to the parish church of the parish in which the chapel is situated, or if in an extra-parochial place, to that which is next adjoining. Sect. 4.

And by 44 Geo. III. c. 77. and 48 Geo. III. c. 127. these provisions have been extended to all marriages celebrated in such chapels before the 23d Aug. 1808, 44 Geo. III. c. 77.

(1) Rex *v.* Preston, Burr. S.C. 486. 2 Bott, 70. Pl. 105.

(2) Rex *v.* Northfield, Dougl. 659. Cald. 115.

and the registers are to be preserved and be evidence as in 26 Geo. II. c. 33.

Bastards within 26 Geo. II. c. 33.

The 26 Geo. II. extends to all persons married in England and Wales, except jews or quakers. Illegitimate children, although looked upon by law as not having any father, are held to be within it; a marriage therefore by licence, between two illegitimate children who were minors, without consent of parents or guardians, was held void, and that it did not confer the man's settlement upon the woman nor upon his children by her. (1)

The court of king's bench were further of opinion, that the power of consent given to the "father and mo-"ther," was intended to include reputed parents, as being interested in their children's welfare, and bound to provide for them by the laws of nature; and held, that the marriage of such minor, with the consent of her putative father, was valid in law, and would confer a settlement. (2)

Subsequent to these decisions, however, the case of Horner and Liddiard came before the consistorial court in London, 24th May 1799. Miss Liddiard was an illegitimate minor, whose supposed father, John Whitelock, died when she was 11 years old. He left her a considerable fortune by will, which he directed to be paid to her when she should attain the age of twenty-one, or the day of marriage with the consent and approbation of her mother Sarah Liddiard, and George Ashley, or the survivor of them; to whom he further gave the tuition and care of his daughter during her minority. Miss Liddiard, when a minor between eighteen and nineteen years old,

(1) Rex *v.* Hodnott, 1 Term Rep. 96. Rex *v.* Preston, Burr. S. C. 486.

(2) Rex *v.* Edmonton, Cald. 435.

was

was married by special licence to Thomas Strangeways Horner, Esq. who had then arrived at the years of legal discretion. The licence stated that the marriage was solemnized by and with the consent of Sarah Liddiard, there styled Sarah Whitelock, widow, her mother and guardian; and which consent was in fact obtained. The report does not state whether Mr. Ashley, to whom the joint power of consenting to Miss Liddiard's marriage was given by Mr. Whitelock's will, was living or dead; and it was proved that no guardian had been appointed in chancery.

In February 1799, Mr. Horner instituted a suit to obtain a sentence pronouncing the marriage null and void, the proper consent not being obtained under sect. 11. of the act. The learned judge, Sir William Scott, was of opinion with the court of king's bench, that illegitimate minors are within the statute, and therefore that consent was necessary to render the marriage valid; but he differed from that court, where they held, that the reputed parents are enabled to consent, and was of opinion that it could be lawfully given only by a guardian appointed by the court of chancery, and that otherwise the marriage is a nullity. He observed, that the court of chancery considered this to be the law, by uniformly appointing guardians to consent to the marriage of bastards, although the father and mother were living; that the ecclesiastical court followed the court of chancery in adopting that construction, and has always refused to grant licences upon the mere consent of the natural father or mother, and unless it is stated that they are the lawful father and mother; and he had always understood that the form of the affidavit upon which licences are now granted was originally settled at the time of passing the act, upon great consideration, and by eminent lawyers

of

of both professions; for want of which consent, he annulled the marriage in the case before him. (1)

The authority of this case is supported in a solemn decision by three judges in the court of King's Bench, who certified in a case sent for their opinion from the rolls, "that all marriages whether of legitimate or illegitimate persons, are within the general provision of 26 Geo. II. c. 33. which requires all marriages to be by banns or licence; and that the consent of the natural mother by licence of an illegitimate minor is not a sufficient consent within the 11th section of that act, and that his marriage is void. (2)

But though the marriage, if celebrated in England, must comply with the provisions of the act, yet if minors domiciled in England, withdraw themselves into Scotland, or places beyond the seas, even for the purpose of evading, and, as it were, in fraud of the statute, the marriage is good to all intents and purposes. (3)

(1) Dr. Croke's Report of Horner *v.* Liddiard, determined 24th May 1799. The learned judge adhered to this opinion in the case of Daniel *v.* Cooke.

(2) Priestly *v.* Hughes, 11 East, 1. Grose, J. differed from the other judges, and certified that the legislature from the words of sect. 11. seemed to have only in their contemplation the marriages by licence of such legitimate children, who had or might have either parents to consent to the marriage of such children, or guardians whom the legislature intended to substitute for such parents under different circumstances, and that they had not in their contemplation to provide for the marriages of illegitimate children whose parents could not legally forbid the banns if they were to be married by banns, and who could have no such parents as are intended to be described in the 11th section of the act above mentioned, that is, legitimate parents, if they were to be married by licence, and therefore that such a marriage was by banns *onufruo* in the statute, and good and lawful. The question is now depending before the House of Lords, in an appeal from the decree in this case.

(3) Crompton *v.* Bearcroft, Bull. L. N. P. 113. And the opinion of Eyre, C. J. Philips *v.* Hunter, 2 H. Black. 412. Ilderton *v.* Ilderton, 2 H. Black. 145.

A sol-

A soldier on service with the British army in St. Domingo, being desirous of celebrating marriage with the widow of another soldier who died there, the parties went to a chapel in the town, and the ceremony was performed by a person appearing as a priest, and officiating as such, the service being in French, but interpreted into English by one who officiated as clerk, and which the pauper understood at the time to be the marriage service of the church of England. This was held sufficient evidence after 11 years cohabitation, that the marriage was properly celebrated, although the pauper stated that she did not know that the person officiating was a priest. (1)

In England where a marriage is celebrated in pursuance of banns, they must be published in the real names of both parties, or it is null and void; because the very end and object of the publication of banns would be defeated if it were not to convey a true description of the persons (2). The

(1) Rex *v.* Brampton, 10 East, 282. Lord Ellenborough, C. J. delivered his opinion, 1st, considering it as a marriage in a place where the law of England prevailed, and must be supposed (in the absence of evidence to the contrary) that the law of England, ecclesiastical and civil, was recognized by subjects of England in a place occupied by the king's troops, this would be a good marriage before the marriage act, and consequently would be so now in a foreign colony to which that act does not extend. It was celebrated by a priest, that is, by one who publicly assumed the office, and appeared habited as such. It did not appear what persuasion he was of, but if he had been a catholic priest, the marriage would have been good in England, as a contract per verba de præsenti, independent of the provisions of the marriage act. 2d. Supposing the law of England not to have been carried into St. Domingo by the king's forces not obligatory upon them in that particular; the facts stated would be evidence of a good marriage according to the law of that country whatever it might be, and every presumption must be made in favour of its validity.

(2) I understand this to have been settled by many decisions in the Consistorial Court, and it was recently adhered to by Sir W. Scott in the case of Mather *v.* Neigh, falsely calling herself Mather, Trinity Term, 47 G. III. "The woman's real name was Neigh, "and in the banns published she was "called by the name of Wright, being "the

The banns also must be published three times to render it valid. (1)

Direct proof of marriage. 1. Copy of register.

For the purposes of a settlement, a marriage may be proved several ways: 1st, By an examined copy of the register (2), and some evidence of the identity of the parties, as if the hand writing of the husband and wife to the register is proved (3); or by people who came to the wedding dinner, or who were paid by them for ringing the bells for the wedding, or any other circumstances sufficient to satisfy the court that they were the same persons. (4)

Entry in register,

The 26 Geo. II. c. 33. requires that marriages shall be solemnized in the presence of two or more credible witnesses, besides the minister who shall celebrate the same; and that it shall be entered in the registry, in which entry shall be expressed, whether the marriage was celebrated by banns or licence, and signed by the minister and the

" the name of a family into which she " was said to have been adopted upon " the death of her parents. It was in " proof that she had been supported " by that family for a considerable " time; but there being a complete " failure of evidence to sustain the " material fact of her having gone by " the name of Wright, the learned " judge pronounced a judgment decla- " ratory of the nullity of the mar- " riage." It appears from this note, that if the party had passed by her assumed name for a sufficient period so as to be commonly known by it at the time when the banns were published, that it would have been good, and with this the common law appears to coincide. " For a man may have divers names, [i. e. surnames,] at divers times, but not divers christian names," Co. Lit. 3. But a man or a woman can only change their name of baptism when they are confirmed, in which case they must afterwards use the name taken at confirmation. Resolved by all the judges in Sir Francis Gawdy's case, Ibid.

(1) Post. 270. (6).

(2) A certificate of marriage is subject to a stamp duty of 5s. 44 G. III. c. 98. Schedule (A.) But certificates of the marriage of a common sailor, marine, or soldier, are excepted, Ibid.

(3) But the register itself must be produced in this case. A copy of the register of marriage kept in a chapel in a foreign country is not admissible in evidence. Leader *v.* Barry, 1 Espin. N. P. C. 353.

(4) Birt *v.* Barlow, Dougl. 162. Bull. L. N. P. 27.

parties married, and attested by two witnesses; but this entry in the register is not of the essence of the marriage; so that where there was an entry of a marriage by banns, and neither the minister, the parties, nor the witnesses had signed it, the marriage was held valid for the purposes of settlement. (1)

not essential to its validity.

Even where the witnesses do sign, it is not necessary to produce them, as it would be in the case of deeds or any other attested instrument that is adduced in evidence. (2)

2. The marriage may be proved by any person present at the ceremony (3); even the husband and wife; and these last are also competent witnesses to disprove the fact (4); or their declarations after their death (5), or reputation in the family (6). But neither husband nor wife are admissible to prove the fact of marriage, where it might tend to criminate the other: and upon the same principle of public policy, their evidence shall not be admitted, when it tends that way, even in collateral cases. Where therefore a marriage in fact was proved between two paupers, a former wife was held not to be a competent witness to establish her previous marriage with the husband (7). But this rule seems to depend entirely on the principle of moral convenience, for if the husband is dead, the first wife may prove the marriage. (8)

2. By persons present. Husband and wife when witnesses, &c.

3. Their declaration. When not.

(1) Rex *v.* St. Devereux, Burr. S. C. 506. S. P. Per Lord Kenyon, Read *v.* Passer, Peake's Ni. Pri. Ca. 231.

(2) Bull. L.N. P. 27. Yet query if it be not necessary when the register itself is produced.

(3) Bull. L. N. P. 27.

(4) Standen *v.* Standen, Peake's Ni. Pri. Cas. 32. Rex *v.* St. Peter's Worcestershire, Burr. S. C. 25. Rex *v.* Stockland, Burr. S. C. 508. Henley *v.* Chesham, 2 Bott, 75. Pl. 112. Rex *v.* Edmonton, Cald. 435.

(5) Rex *v.* Bramley, 6 Term Rep. 130.

(6) Reed *v.* Passer, Peake's Ni. ri. Cas. 231.

(7) Rex *v.* Cliviger, 2 Term Rep. 263. See also Davis *v.* Dinwoody, 4 Term Rep. 678. Bentley *v.* Cooke, 2 Term Rep. 265. 269.

(8) Henley *v.* Chesham, 2 Const. 75. Pl. 112.

3. By

3. Cohabitation.

3. By the presumption arising from the conduct of the parties to each other, as where they cohabited together for the space of thirty years, and treated each other as man and wife (1). Indeed in every civil case, except an action for criminal conversation, general reputation, the acknowledgment of the parties, and reception by their friends, &c. as man and wife, is sufficient proof of coverture. (2)

4. Ecclesiastical sentence.

4. Where a marriage is in fact had, or in a contract *in præsenti*, or in a suit for restitution of conjugal rights, a sentence in the ecclesiastical court having proper jurisdiction, whether it be a foreign court or not, will, (unless there be collusion, which will overturn the whole) be conclusive, and bind all. But not if given in a collateral suit, as for a criminal action; for it will only bind the right of the marriage in the three cases above. (3)

5. By admission when conclusive.

1. Certificate.

2. Order of removal unappealed from.

5. The strongest of all proofs is when the parish against which it is sought to establish the marriage, have so far admitted the fact as to be estopped from controverting it. As where it has granted a certificate in which it acknowledges the parties to be man and wife (4); although she is only described as his wife generally without being named therein, and has a former husband living (5). Also where the man and woman have been removed as husband and wife (6); or where the woman is removed as married,

(1) Rex *v.* Stockland, ut supra, 269. n. (4).

(2) Per Lord Kenyon, C. J. Leader *v.* Barry, 1 Espin. N. P. C. 353.

(3) Per Lord Hardwicke, C. Roach *v.* Garvan. 1 Ves. 159. And it is equally conclusive if established in a foreign court according to the law of nations. Eod. Jud. Ibid. See also Duchess of Kingston's case, post. 273. (2).

(4) Rex *v.* Headcorn, Burr. S. C. 253. Rex *v.* Ullesthorpe, 8 Term Rep. 465.

(5) Rex *v.* Lubbenham, 4 Term Rep. 251.

(6) Rex *v.* Silchester, Burr. S. C. 551. Rex *v.* Berkswell. Rex *v.* Binegar, 7 East, 377. where the order was stated to be made on the evidence of the wife only, for she may know the fact as well as any other witness.

without

without her supposed husband, and the parish to which the removal is made, has not appealed against the order (1). So if she is removed by the name and description of "E. Smith, widow," it is conclusive of her husband's settlement, if he is then alive, and the order unappealed from (2): for the presumptive conclusion to be drawn from her being removed as a married woman, or as a widow, where nothing is stated in the order to contradict it, is, that she is removed to her husband's settlement; and if the parish did not mean to acquiesce in that conclusion, they should have controverted it by an appeal.

When conclusive.

This evidence is so strong between the parties giving and receiving the certificate, or those removing and receiving the pauper, that it is absolutely conclusive of the fact, so that it cannot be controverted by them, although the marriage has never taken place. (3)

When presumptive.

As between other parishes it is strong presumptive evidence, but not so conclusive as to exclude proof to contradict it.

Proof of marriage.

It is sufficient *prima facie* evidence of a regular marriage, to establish the fact by any of the modes of proof already stated; it follows from thence, as matter of legal assumption, until the contrary appears, that all circumstances necessary to render it valid did take place.

Proof to impeach its validity.

The party therefore who is interested to controvert it, must come prepared to prove what he relies on to impeach

(1) Rex *v.* Hinxworth, Cald. 42. Rex *v.* Leigh, Dougl. 45. Rex *v.* Towcester, 2 Bott. 679. Pl. 740. Rex *v.* St. Mary Lambeth, 6 Term Rep. 615.

(2) Rex *v.* Rudgely, 8 Term Rep. 620.; and as to the effect of orders of removal unappealed from, see post.

(3) Cases, p. 269. n. (8). 270. (1).

the

the validity (1), unless he can extract it by cross examination or otherwise, from such evidence as the adversary has produced.

1. Where void ab initio.

These facts are, 1st, That the provisions established by the marriage-act have not been complied with, as, where it is by banns, that they were not duly published three several times (2). 2d, Where the marriage is null and void *ab initio* without the sentence of a court ecclesiastical, as where one of the parties was previously married to a person living at the time of the second marriage (3), or where he who pretends to perform the ceremony is not in holy orders (4). These circumstances may be proved by oral testimony.

But it is not expressly decided, whether any other cause which renders a marriage null and void *ab initio* can be given in evidence in a temporal one, without producing a judgment of the ecclesiastical court, or the bishop's certificate. It seems however most reasonable, that all disabilities by which the marriage is rendered void, may be examined into upon the same principle; and therefore that no settlement can be gained by marriage with an idiot, or an insane person, unless celebrated during a

(1) Per Lord Mansfield, Rex. *v.* St. Devereux, Burr. S. C. 506.

(2) Standen *v.* Standen, Peake's Ni. Pri. Ca. 32. See also Wilkinson *v.* Payne, 4 Term Rep. 468. ante, 215.

(3) Westbrook *v.* Strutville, 1 Str. 79.

(4) Sembl. Rex *v.* Luffington, Burr. S. C. 232. Haydon *v.* Gould, 1 Salk. 119. where the ceremony was performed prior to the marriage-act. And see Rex *v.* Bedall, 2 Str. 1026. post. Quære tamen, and by Lord Kenyon, C. J. before the 26 Geo. II. c. 33. I think (though I do not speak meaning to be bound) that even an agreement between the parties per verba de præsenti was ipsum matrimonium. Reed *v.* Passer, Peeke's Ni. Pri. Ca. 232. Per Pemberton, C. J. Weld *v.* Chamberlain, 2 Show. 300. and it is laid down as clear law that a contract per verba de præsenti would have bound the parties before that act. Per Lord Ellenborough C. J. Rex *v.* Brampton, 10 East, 282. See also Holt *v.* Ward, 2 Stra. 937. Swimb. 74. Wigmore's case, 2 Salk. 438. Collins *v.* Jessot, 6 Mod. 155. Rex *v.* Hodnett, 1 Term Rep. 96.

lucid

lucid interval (1). By 15 Geo. II. c. 30. if persons found lunatics, or committed to the care of trustees by any act of parliament, marry before they are declared of sound mind by the chancellor, or the majority of such trustees, the marriage is totally void. Lunatics.

But where the sentence of an ecclesiastical court of competent authority is necessary to annul the marriage, it being good unless a judgment is pronounced during the lives of both parties, the sentence must be produced; and it is conclusive evidence of that fact, where the suit was instituted for the express purpose of annulling the marriage, and its validity cannot be controverted in a civil suit, except on the ground of collusion between the parties. (2) 2. Sentence of ecclesiastical court.

Such a sentence seems, also upon principle, not less effectual to establish than to annul the marriage. (3)

3. The sentence of a foreign court of competent authority, where the parties were domiciled at the time; that is, where they abide with the purpose of permanent residence; or any other form of divorce established there between persons of the same religious persuasion. (4) 3. Sentence of a foreign court.

4. Divorce by act of parliament. 4. Statute.

For proof of the various ways by which the husband's settlement is to be established, see the subsequent titles of settlement.

(1) 1 Black. Com. 439. But it was formerly held, that if an idiot contracted matrimony it was good, and should bind him. By 3 Judges, Manby *v.* Scott, and said to be so adjudged in Stiles *v.* West. 3 Jac.

(2) Duchess of Kingston's case, 11 St. Tri. 198. Amb. 756. S. C. Dacosta and Villa Real, 2 Stra. 961. and the cases cited in the note to the 3d edit. Hume *v.* Burton. App. to Cruise on Fines, &c. 46. See also Cross *v.* Salter, 3 Term Rep. 639. and ante, 270.

(3) See Roach *v.* Garvan, ante, 217. Per De Grey, C. J. Dutchess of Kingston's case, 11 St. Tri. 261.

(4) Ganer *v.* Lady Lanesborough, Peake's Ni. Pri. Ca. 17. But it must be in a proper cause, and without collusion. See Roach *v.* Garvan, 1 Ves. 157. ante, 270.

CHAPTER XVIII.

Of the Settlement of Legitimate Children by Parentage or Birth.

1. The father's settlement at the birth.

THE second species of derivative settlement is acquired by relationship between parent and child. The original settlement of legitimate children being that which the father has at the time of their birth, and it makes no difference that the child is born in another parish (1), or that the father dies previous to the birth (2), or that neither he nor the son have been in the place of settlement since the latter was born. (3)

The manner in which the parental settlement has been acquired is equally immaterial. It may be gained by the father's own act, or derived from his father or grandfather, or any other more remote relation to whom a settlement is first traced in the direct ascending line. (4)

2. Gained after.

But although the father's settlement at the time of birth is the original settlement of his legitimate offspring, it is superseded if the parent gains one subsequently, while the child continues to form a part of his family. (5)

(1) Coxwell *v.* Shillingford, Fort. 313. This was once doubted. See Rex *v.* Luckington, Comb. 380. 3 Salk. 257. 2 Bott, 22. Pl. 39. But the law is now quite settled.

(2) Regina *v.* Clifton, Abr. 382; and see Cunmer *v.* Milton, 6 Mod. 87.

(3) St. Giles Reading *v.* Eversley Blackwater, 1 Str. 580.

(4) Rex *v.* St. Matthew's Bethnal Green, Burr. S. C. 482.

(5) See post. 277.

Where

Where the father has not a known settlement before his child becomes chargeable, that which the mother had previous to her marriage is communicated in the same manner, and subject to the same rules. (1) The mother's at time of birth.

But as the father's settlement, where he has one, must always fix that of his child, it is obvious that recourse should be had to the settlement of the father's mother, prior to that of the pauper's own mother, for it is the father's settlement, if his father have none; and upon the same principle, that of the father's grandfather's mother precedes that of his own mother, and so on to the more remote degrees of lineal ancestry.

Thus where Elizabeth Taylor was born in St. Catherine's, and married Edward Brazier, whose settlement was unknown: his widow afterwards married Isaac Coiffeau, a Frenchman, who never gained a settlement. She had by him Abraham Coiffeau, born in the parish of Bethnal Green. Abraham married Mary Dormer, whose settlement was in St. Leonard's, Shoreditch. Abraham died, and Mary his widow, with her children, becoming chargeable, they were held to be settled in St. Catherine's, being the birth settlement of Elizabeth, Abraham's mother; for there is no distinction between an acquired settlement and a derivative one; the positive law in these cases of settlements is, that the child's settlement follows that of its father, if the father's can be found. (2)

But the right of settlement is only gained by the heads of families for their lineal descendants, and is not

(1) Rex *v.* St. Botolph's, Burr. S.C. 367. Tynton *v.* King's Norton, Ib. 31. Pl. 54.; and see 26 Resol. of Judges of Assize 1633. ante, 257.

(2) Rex *v.* St. Matthew's Bethnal Green, Burr. S. C. 482.

transmissible through collateral branches, as from uncles or cousins; nor in the ascending line, from child to parent; as real property would in the first case, and personal in both.

1. Settlement from the mother.

The settlement which a child derives from its mother during the father's lifetime, must be acquired previous to her existing marriage, for she can acquire none during coverture, except through her husband. (1)

2. After widowhood.

But if the father die, the mother becomes the head of the family, in which event nature and the law casts the obligation to provide for it upon her. A settlement therefore gained in her own right during widowhood, is communicated to her unemancipated children (2), although past the age of nurture (3). But if she acquire a settlement by another marriage, it is not gained as the head of a family, but as a subordinate part of some other, and therefore is not communicated to her former offspring. (4)

The rules respecting the transmission of parental settlements acquired previous to the child's birth, are too clear to generate much doubt or discussion; it arises from the relationship, and cannot be defeated by the parent's misconduct.

Father attainted.

A father who gained a settlement was attainted for felony: he married afterwards and had children, but re-

(1) Berkhampstead *v.* St. Mary North Church, 2 Bott, 33. Pl. 56. and post.

(2) By renting a tenement of 10l. a-year. St. George *v.* St. Catherine's, 2 Lord Raym. 1474. Or on lands in which she had a freehold estate in her own right, 2 Ld. Raym. 1475. Rex *v.* Oulton, Burr. S. C. 64. Or by residence on her husband's estate, although he could not gain one by a like residence in his lifetime. Rex *v.* Long Wittenham, 2 Bott, 38. Pl. 60. and see Rex *v.* Paulsperry, 1 Barn, 11.

(3) Rex *v.* Barton Tuffe, Burr. S. C. 49.

(4) Rex *v.* St. Giles's in the Fields, Burr. S. C. 2.

ceived

ceived no pardon. It was held, that the settlement gained before attainder was communicated to his children born afterwards; for a settlement is not the property of any man, it cannot escheat, nor be called a franchise. (1)

Neither will any incapacity in the child to sustain the civil duties of life prevent it. Thus it has been decided, (and it seems surprising that such a question should be made), that an idiot, if legitimate, is settled where his parents are. (2)

3. Paternal settlements gained after birth communicated.

But the communication of settlements gained subsequent to the child's birth, takes place only whilst it continues a member of the parent's family. When it ceases to be so, or (to use a phrase borrowed from the Roman law, and not very properly applied by us) after it is emancipated, any settlement which the parent may acquire subsequently is not transmissible; but it retains that derived from the parent prior to emancipation, until it obtains a new one by some other means.

Of emancipation.

There are two cases in which the child is considered as being severed from the parent's family, without any reference to a separation in fact.

When child gains a settlement.

1. When a child has obtained a settlement in its own right, that previously acquired from the parents is superseded, and it no longer follows one that is subsequently gained by them. (3)

The age at which a child is said to be capable of acquiring a settlement by its own act, is seven years, at

(1) Rex *v.* St. Mary Cardigan, 6 Term Rep. 116. See the opinion of Rider, C. J. ante. 256. Rex *v.* Haddenham, 16 East, 463. acc.

(2) Hard's case, 2 Salk. 427.

(3) Rex *v.* Witton cum Twambrookes, 3 Term Rep. 355. Rex *v.* Silton, 1 Wils. 184. But see Rex *v.* Ingworth, 8 Term Rep. 339. post. vol. ii.

the expiration of forty days, after which it may acquire one. (1)

When it marries.

2. Where it becomes the head or part of another family by marrying, that being a relation inconsistent with a subordinate situation in that of its parents (2). Thus a son, who being of full age and married, afterwards removed into another parish with his father, where he continued to live with him, was held not to follow a settlement which the father subsequently acquired there. (3)

But marriage seems necessary to make a child the head of a family when there is no separation. A son who, after he was of age, continued to live with his mother, then a widow, and residing under a certificate granted to the husband, does not become the head of a new family, nor is he emancipated by setting up in business for himself and hiring servants of his own. (4)

Separation after 21.

An actual separation is necessary in all other cases; for a child may, after attaining the age of twenty-one, derive a new settlement from its parent, provided it remain at the time of its acquirement a member of the father's family, with an unbroken continuance. (5)

Separation and return during minority.

Where a separation has taken place, this distinction as to when it shall emancipate the child, or otherwise, has

(1) 3 Burn's Just. tit. Poor. 3 & 4 Ed. VI. c. 16. and 14 Eliz. c. 5. permit the separation of children from vagrant parents at the age of five. See 23 Resol. of Judges 1633. Dalt. 236. Dumbleton *v.* Beckford, 2 Salk. 470. Fol. 271.

(2) At in nepotes avi potestas hodie nulla est quia nuptiis per universam Europam patria potestas solvitur, nec reviviscit matrimonio liberorum soluto, quia quod semel extinctum est sine nova causa non potest renasci; proinde viduæ nihilo magis in potestate sunt quam nuptæ seu minores sive majores. Hub. Prelect. Lib. 1. Tit. ix. § 3 De Patria Potest.

(3) Rex *v.* Everton, 1 East, 526. Bugden *v.* Ampthill, Burr. S. C. 270. Rex *v.* Mortlake, 6 East, 397.

(4) Rex *v.* Sowerby, 2 East, 276.

(5) Per Lord Kenyon, C. J. Rex *v.* Roach, 6 Term Rep. 247.

been laid down: "If a child under the age of twenty-"one years leaves his father's house, and is thereby *quâ* "severed from his father's family, and returns to his "father during a state of pupilage, during which time "policy requires that the child should be under the pro-"tection of his father, he must be considered as incor-"porated with his father's family, unless he has gained "a distinct settlement of his own, or has become the "head of a family himself." (1)

But if when that time arrives when in estimation of law the child wants no further protection, he removes from the father's family, he is not for the purpose of a derivative settlement to be deemed part of that family. (2)

Boy residing with his uncle, &c.

Thus a boy, when seven years old, resided nine or ten years with his uncle for support, returning occasionally to his father's house, particularly upon any disagreement with his uncle, and being looked upon as part of his father's family by all parties; he derived a settlement from his father, which the latter had gained eighteen months subsequent to the boy's going to his uncle (3). So where the father ran away when his son was of the age of eight, his mother dying half a year afterwards, and he was supported by his parish until he was able to maintain himself; he followed the settlement gained by the father during his minority. (4)

Controul given to a master.

Neither does it make any distinction, that the father, at the time of the separation, gives a master or any other person a degree of legal controul over his child, provided he reserves to himself so much of the parental rights

(1) Ante, 278. n. (5), post. 282.
(2) Ibid.
(3) Rex *v.* Tottington Lower End, Cald. 284. See also Rex *v.* Offchurch, 3 Term Rep. 114.
(4) Rex *v.* Witton cum Twambrookes, 3 Term Rep. 355.

as are consistent with it. Thus where a father hired out his son at the age of thirteen, for several successive periods, but insufficient to confer a settlement, until he was nineteen, received his wages and washed for him; the boy never returned home during the time, except for three weeks, from illness, and never lived with his father after leaving him thus, until the order of removal, which was made when he was nineteen; he is not emancipated. (1)

Hiring in extra-parochial place.

A son hired as a yearly servant, in an extra-parochial place (where he could not gain a settlement), who returned to his father at the end of the year unsettled, under age, and unmarried. (2)

Apprentice under void indenture.

A son bound at the age of sixteen, under an indenture for four years, which was void for want of a stamp, and never after returning to his father's house as a home (3), was held not to be emancipated, but to follow the father's settlement subsequently acquired during the period of minority. (4)

In certificated parish.

Likewise a son was bound an apprentice at the age of fifteen, for four years, in the parish where his father resided, under a certificate. The father, during the apprenticeship, acquired a settlement by residence in W. another parish. The son, at the expiration of his apprenticeship, being a minor, came to his father's house in W. whenever he pleased, and kept his holiday clothes there, but was his own master to go and work where he pleased: he was held to follow his father's settlement in W., being neither emancipated nor independent of him. (5)

(1) Rex *v.* Stretton, 1 Const. 47. Pl. 74.

(2) Rex *v.* Collingbourn Ducis, 4 Term Rep. 199.

(3) Rex *v.* Edgworth, 3 Term Rep. 353.

(4) Rex *v.* Collingbourn Ducis, ante, n. (2), was a case of emancipation from a certificate.

(5) Rex *v.* Halifax. Burr. 5. c. 806.

The father of the pauper being originally settled in another parish about 40 years ago, came to reside in Hardwick upon a tenement under 10*l.* a year, which he rented, and during his residence there, and while his settlement continued in the parish to which he originally belonged, he put his son, then 15 years of age, out apprentice for 4 years to a person residing under a certificate in the parish of B. While the son resided with his master, the father acquired a settlement in H. by purchase for above 30*l.* of the tenement which he before rented, and the boy served his master the stipulated period. During all which time he was clothed by his father, whom he occasionally visited on holidays, and at other times with his master's leave, and at the expiration of his apprenticeship, being then aged 19, he returned to his father's house, staid there two days, and received new clothes from him, and then went to service. Thus requiring and receiving assistance from his father, he must be considered as reincorporated on his return into his father's family, and entitled to all the rights of one of its members, and therefore he followed the settlement which his father had acquired in H. during the period of his son's apprenticeship. (1)

So where a son enlisted, at the age of sixteen, into the same regiment of militia in which his father was serving as a serjeant, and lived with him until the age of twenty-three, the father receiving his pay, it was adjudged that he followed the settlement acquired by the father during this service in the militia and residence with him: for living in the family, the parental controul was not altogether destroyed, the guidance and direction of the child to a certain extent was not inconsistent with the occasional military situation in which he was. (2) Son enlisted.

(1) Rex *v.* Hardwick, 11 East, 578.

(2) Rex *v.* Woburn, 8 Term Rep. 479.

But

Separation after majority.

But a child, once severed from his father's family after he becomes of age, cannot be again incorporated with it, so as to follow any settlement which the parent acquires subsequently.

A father removed into another parish, where he gained a settlement, but the son, being above twenty-one, staid behind, married, and lived with his wife and family apart from his father.—The father's new settlement was not communicated to him. (1)

There was a marriage in this case; which has been settled by subsequent determinations to emancipate a child who continues to reside with the parent.

Voluntary.

But the mere circumstance of a voluntary separation by a child when of full age, who was thereby put out of the parent's controul, was held to amount to such an emancipation as prevented the communication of a new parental settlement. A daughter, twenty-two years old, having had a bastard, left her father's house, and hired herself to a farmer in the same parish as a wet nurse. She lived there eight weeks, for which she was paid eight shillings, at the expiration of which time she returned to her father, who had removed during that period to another parish, and gained a settlement previous to her return by renting a tenement at 12*l.* a year. It was held, that having removed from the father's family at an age when, in estimation of law, she wanted no further protection from the father, she could not afterwards be deemed part of that family, for the purpose of a derivative settlement. (2)

Separation as a minor continued afterwards.

Upon the same principle also, if a child has separated during its minority, and continues so after it has attained the age of discretion, it is emancipated.

(1) Eastwoodhey *v.* Westhodhey, 1 Str. 438.; also Bugden *v.* Ampthill, Burr. S. C. 270. Rex *v.* Heath, 5 Term Rep. 583.

(2) Rex *v.* Roach, 6 Term Rep. 247.

As

As where a son, nineteen years old, went into another parish, married, and continued separate forty years previous to his father gaining a new settlement, without having himself acquired one, he does not follow this new settlement of his father's (1). So a son who enlisted for a soldier at the age of nineteen, and served abroad, but returned after four years to his father, and married, does not follow his father's settlement gained after enlisting (2). Likewise the son of a Scotsman, who enlisted in the army at nineteen years old, before the father had acquired any settlement in England, and who did not return to Great Britain until after his father's death, was held not to be settled in the parish where the father had gained one after their separation; for he was emancipated some years before the father had acquired a settlement, and had put himself under the controul and government of others; and it is immaterial whether or not he has no other settlement for himself. (3)

Separation and return during minority.

In these cases, if the sons had quitted the army and returned home before twenty-one, they would have been considered as part of the father's family, and participated in any subsequent settlement acquired by him, until their complete emancipation (4). So when a father on his wife's death broke up housekeeping, and his daughter, then 11 years old, was taken by her uncle, and continued to live with him as one of the family (doing the work of a servant, but without being hired as such) until she was 27 years old, the uncle finding her clothes and pocket money. Thus living away from her father before and after she was 21, he having no house of his own, nor

(1) St. Michael's in Norwich *v.* St. Matthew's in Ipswich.

(2) Rex *v.* Walpole St. Peter's, Burr. S. C. 638, 2 Bott, 44. Pl. 68.

(3) Rex *v.* Stanwix, 5 Term Rep. 670.

(4) Per Lawrence J. Rex *v.* Roach, ante, 282. n. (2); and see Rex *v.* Hardwick, ante, 281. (1), acc.

giving

giving her any support, she ceased, "*after she became of* "*age,*" (1) to be part of her father's family, as no future settlement gained by him could be communicated to her: and the court held that the father acquired a settlement by a hiring and service for a year subsequent to his daughter's coming of age (2). It does not seem settled by an express decision, whether an emancipation, which is not completed but by the child's not returning under the age of twenty-one, is to refer to the period of its original separation within the age of minority, or to that of its arrival at the years of discretion. (3)

In the first supposition, the child will not follow any settlement gained during the minority, if acquired subsequent to the separation; in the second, it will.

In Rex *v.* Stanwix, the father acquired his settlement after the son came of age. In Rex *v.* Walpole St. Peter's, the time of gaining the settlement in Walpole parish is not set forth. But in Rex *v.* Cowhoneybourne, the court seemed to refer the point of the daughter's emancipation to the time when she became of age.

Separations which do not emancipate.

But every separation in fact does not amount to an emancipation, although it occurs after the age of majority. Thus where it is for an occasional purpose, as going out for a few weeks in harvest, the son continues part of the family notwithstanding (4). So where a girl having her hands burned off, was incapable of work, and her father being unable to maintain her, procured her to be maintained by the parish; and she was placed in the

(1) Verba Le Blanc, J. 10 East, 88.

(2) Rex *v.* Cowhoneybourne. Ibid.

(3) See the opinion of Lawrence, J. Rex *v.* Woburn, 8 Term Rep. 429. and supra, n. (1), (2).

(4) Rex *v.* Sowerby, 2 East, 276. See Rex *v.* Roach, ante, 282. n. (2). But the time for which the pauper was hired, or whether he was hired, did not appear in Rex *v.* Sowerby.

parish

parish workhouse, where she continued until her father gained a settlement in another parish after she came of age; this was held to be nothing like an emancipation, but that she followed the new settlement afterwards acquired by her father. (1)

For the reason of drawing a distinction between separation before and after the child has attained the years of maturity ceases, when imbecility of mind or body induce the necessity of its continuing in a state of perpetual pupilage.

The principle which prevents the child from following any settlement acquired by its parents subsequent to emancipation, must, when they have none, prevent it from having recourse to that gained by the grandfather, or other persons in the ascending line, subsequent to the time when the father and mother, or other ancestors, through whom they claim, have been emancipated, and ceased to form a part of the family of their immediate parents. (2)

Where the parents have no settlement (3), or if it cannot be ascertained, a legitimate child is settled in the place of its birth (4); or if that is unknown, where it is first found. (5)

(1) Rex *v.* Broadhembury, 2 Bott, 49. Pl. 72. See also Rex *v.* Long Wittenham, where the daughter was separated from her mother and family, they having caught the small-pox, and Lord Mansfield, C. J. "The daughter was separated from her family by the act of God, and it cannot be considered an emancipation so as to prevent her gaining a settlement." But the daughter seemed to have been under age.

(2) Rex *v.* Darlington, 4 Term Rep. 797.

(3) Per Wilmot, J. Rex *v.* St. Matthew's Bethnal Green, Burr. S. C. 42.

(4) Whitechapel *v.* Stepney, Carth. 433. See also Clavely *v.* Burton, 2 Bulst. 351.

(5) Per Holt, C. J. Banbury *v.* Broughton, Comb. 364. Dalt. 168.

SECT. II.

Proofs necessary to support this Settlement.

THE place of a legitimate child's birth is *primâ facie* its place of settlement, and proof thereof is sufficient to throw the burthen on the other side of establishing a settlement by parentage (1). But whichever side means to rely upon the latter, must give in evidence,

1. The marriage. (2)

2. That the pauper is the issue of that marriage.

When the actual descent is proved, very slight evidence will be sufficient in the first instance to establish the legitimacy; for the law does not presume that the parents have lived in a state of concubinage, criminal in them, and productive of penal disability to their innocent offspring. (3)

It lies on the other side to establish the bastardy by that evidence which will be stated in treating of the settlement of illegitimate children by birth. The evidence therefore of the father and mother; an examined copy of the parish register of the pauper's birth or christening, with evidence of his identity (4); or that his parents were

(1) Rex *v.* Whixley, 2 Const. 14. Pl. 34. Rex *v.* Heaton Norris, Ib. n. a. 6 Term Rep. 653.; and see Rex *v.* Woodford, ante, 260. n. (1).

(2) See ante, 260. et seq.

(3) The legal maxim is Semper presumitur pro sententia et *pro legitimatione puerorum*, 17 Vin. Abr. Voc. Presumption. a.

(4) Rex *v.* Creech, Burr. S. C. 765. 2 Bott, 16. Pl. 34. Ibid. 756. Pl. 860.

considered

considered as married persons; or the testimony of any who knew his father and mother, and their being reputed man and wife; or of their acknowledging the pauper as their lawful child (1); and even that of the pauper himself, to this effect is sufficient.

3. The parents' settlement.

The first settlement to be relied upon is that of the father (2), and if he has done no act to gain one, it will be necessary to resort to that of his grandfather or grandmother. If no settlement can be proved on the side of the father, recourse is to be had in the same way to that of the mother. In all these cases, the settlement last gained before their child becomes emancipated is that of the pauper.

(1) Rex *v.* Bucklebury, 1 Term Rep. 164, 2 Bott, 26. Pl. 48.

(2) Ante, 275. and Cripplegate *v.* St. Saviour's, Fol. 265, 2 Bott, 16. Pl. 33.

CHAPTER XIX.

Of the Settlement of Illegitimate Children by Birth.

SECT. I. *Of the Settlement.*

Bastards.

AN illegitimate child is considered as the offspring of no one (1), or, as it is sometimes termed, to cut off all idea and hope of peculiar relationship, the child of the people. There exists no privity of blood between it and the reputed parents, through which it can lay claim to their settlement: and it is settled in the place of its birth, as we have seen that lawful children are whose parents have none. (2)

Mother residing under certificate.

It is the same if the mother come into the parish under the protection of a certificate (3); unless the parish certifying expressly describes the child therein, and undertakes to provide for it. As where parish officers by their certificate acknowledged A.C. spinster, and the child or children which she now goeth with, to be their inhabitants, and promised to provide for them; it is in that case settled in the parish granting the certificate (4). But the parish will not be bound to do so, where the undertaking is in general terms to provide "for the woman and her child," as that shall always be presumed to signify her le-

(1) 41 Ed. III. 19. 1 Roll. Abr. Bastard, (C). Pl. 1.

(2) Whitechapel *v.* Stepney, ante, 232. n. 3. Rex *v.* Spitalfields, 1 Ld. Raym. 567. Rex *v.* St. Peter's in Worcestershire, Burr. S. C. 25.

(3) Rex *v* Hilton, Burr. S. C. 187.

(4) Rex *v.* Ipsley, Burr. S. C. 650. Quære tamen; and see the opinion of Lord Kenyon, C. J. Rex *v.* Mathon, post. 289.

gitimate

gitimate offspring (1). Even if a certificate is granted when the woman is unmarried and undertakes to provide for the child she is then pregnant with, and all other children that she may thereafter have, until she or they acquire subsequent settlements; it does not extend to an illegitimate child born eight years after the certificate is granted, but it is settled where born. (2)

Although this is the general rule respecting the settlement of natural children, there are some exceptions which exist at the common law, and others which are created by statute. Exceptions by common law.

The first exception by the common law, is, where a woman with child of a bastard is removed out of one parish into another, through the fraud or collusion of its officers. In this case the child, wheresoever it is born, is settled in the parish from which the mother has been collusively removed (3). But the removal of the woman, must have been effected with a fraudulent purpose: for if she should come accidentally into one parish, and in consequence of the self-suggested persuasions of a private parishioner, go into some other, and be there delivered (4); or if she should without fraud leave her own parish, with the knowledge of the overseers, for the purpose of finding the putative father of the child with which she is quick, and be suddenly delivered in some other parish whilst endeavouring to reach her own, these form no exception to the general rule, and the birth decides the settlement. (5) 1. Removal by fraud.

The second exception is, where a child is born after an order has been made for the mother's removal to some 2. Pending an order of removal.

(1) Rex *v.* Wyke, Burr. S. C. 264.
(2) Rex *v.* Mathon, 7 Term Rep. 362.
(3) Tewksbury *v.* Twining, Bulst. 349. Masters *v.* Child, 3. Salk, 66.
(4) Ante, n. (3).
(5) Rex *v.* Astley, Cald. 559.

other parish. In this event, whether it is born in one of the contending parishes (1), or in some intermediate one, while the officers are in the act of removing, or using reasonable diligence to remove the woman (2), it is settled in the parish against which judgment is given, if the order is contested (3); or in that to which the removal is made, where it acquiesces without appeal. (4)

3. Mother in custody.

The third exception is, where the child is born while the mother is in actual custody of the law; as where she is in the house of correction (5), or in the county gaol (6): here it follows the settlement of the mother; or if that cannot be known, it is to be provided for in the parish where she was apprehended. (7)

A fourth exception seems to be, where the child is born in a workhouse belonging to parishes united, under 9 Geo. I. c. 7. and which is situated in a third parish. Here it shall be considered as settled in the parish to which the mother belongs. (8)

Exceptions by statute.

The exceptions enacted by statute are:

13 Geo. III. c. 29.

1. By 13 Geo. III. c. 29. for regulating the Foundling Hospital, no child received there shall thereby gain a settlement in the parish where the hospital is situate.

(1) Rex *v.* Icleford 1 Sess. Cas. 32. Much Waltham *v.* Peram, 2 Salk. 474. Boreham *v.* Waltham, Carth. 397.

(2) Reg. *v.* Icleford, ante, n. (1). Reg. *v.* Jane Grey, post. n. (4).

(3) Westbury *v.* Coston, 2 Salk. 532. & ante, n. (1).

(4) Reg. *v.* Jane Grey. Sett. Rem. 41.

(5) Suckley *v.* Whitborn, 2 Bulst. 358. 32 Resol. Judges of assize 1633. Dalt. 237. ante, 242.

(6) Elsing *v.* The County of Hereford. 1 Sess. Ca. 99.

(7) See also Banbury *v.* Broughton, Comb. 364.

(8) See the opinion of Buller, J. Rex *v.* St. Peter and St. Paul. Cald. 213. post. vol. ii.

2. By

2. By 17 Geo. II. c. 5. s. 25. where a woman wandering and begging, is delivered of a child in any parish or place to which she doth not belong, and thereby becometh chargeable to the same, the churchwardens or overseers may detain her till they can safely convey her to a justice of the peace; and if she shall be detained and conveyed to a justice as aforesaid, the child of which she is delivered, if a bastard, shall not be settled in the place where so born, nor be sent thither by a vagrant pass; but the settlement of the woman shall be deemed the settlement of the child. 17 Geo. II. c. 5.

3. By 13 Geo. III. c. 82. s. 5. no bastard child, born in a lying-in hospital, shall be legally settled in, or entitled to relief as a parishioner from the parish wherein the hospital is situated; but every such child shall follow the mother's settlement, and shall immediately gain a settlement in the parish or parishes respectively, where his, her, or their mothers were last legally settled. 13 Geo. III. c. 82.

4. By 20 Geo. III. c. 36. bastard children born in the house of industry of any hundred or other district incorporated by act of parliament for the relief and employment of the poor, shall be deemed to belong to the parish or place where the mother of such bastard child was legally settled. 20 Geo. III. c. 36.

5. By 33 Geo. III. c. 54. s. 25. for the encouragement and relief of friendly societies, it is enacted, that every child which shall be born a bastard in any parish, township, or place, during the mother's residence therein under the authority of this act, shall have, and be deemed to have the same settlement which the mother has, or is entitled to at the time of the birth of such child. 33 Geo. III. c. 54.

6. By 35 Geo. III. c. 101. s. 6. if an order of removal has been obtained for the purpose of removing an unmar- 35 Geo. III. c. 101.

ried woman who is with child, and it shall be suspended on account of the sickness or other infirmity of such person, and during such suspension the said woman shall be delivered of any child which by the law of this kingdom shall be a bastard; every such child shall be deemed and taken to be settled in the same parish, township, or place in which was the legal settlement of the mother at the time of her delivery.

SECT. II.

Of the Proofs.

THE only proof required to establish this kind of settlement is, that the pauper was actually born within the parish or township. This may be effected either by the testimony of the parents, relations, or any other person acquainted with the fact.

Hearsay inadmissible.

It has been the practice of many sessions, where the parents were proved dead, to admit evidence of their declaration as to the place of the child's birth in proof of the settlement. This rule seems to have been adopted from a supposed analogy to questions respecting the time of a child's birth, where such declarations are evidence (1), and from the obvious difficulty of establishing the fact in most cases by any other means. (2)

But the court of king's bench have decided, after taking time to consider the point, that such declarations cannot be received in evidence. For the controversy is not as in a case of pedigree from what parents the child has derived its birth; but in what place an un-

(1) See post. 298.

(2) Hearsay is good evidence to prove who is my grandfather, where he married, what children he had, &c. of which it is not reasonable to presume I have better evidence. Bull. L. N. P. 294. cites Grimwade and Stephens, Kent 1697.

disputed birth derived from known and acknowledged parents has happened. It involves no question but of locality, which is to be proved by the general rules of evidence, according to the ordinary course of common law. It is not a case of pedigree, and the rules of hearsay evidence do not apply. (1)

But the parish register of the birth or christening, with proof of the pauper's identity, such as that the reputed father and mother passed by the christian and sur-names given to the parents in the register, seems prima facie evidence that he was born in the parish. (2)

Although birth is *prima facie* evidence of a settlement, without any reference to the legitimacy of the pauper, yet questions on the latter point must frequently arise between contending parishes, for the purpose either of getting rid of this birth settlement by proving one by parentage; or *vice versa*, of establishing conclusively that which arises from birth, by destroying the presumption that a preferable one is derived from the parents.

(1) The material parts of the case are as follows: "Upon appeal against an order removing W. H. from Cranbrook to Erith, the Respondents, in support of their case, examined the pauper W. H. who stated, that about 20 years ago, being then about 14 years old, he remembered being at Erith with his father from June to the Michaelmas following. That they lived in a barn, having no fixed residence, but travelling the country from place to place; that he remembered being at other places before their sojourning at Erith; that his father, who was now dead, had told him, that he was born a bastard at Erith, and had pointed to that place as they were passing, telling him that that was the place of his [the pauper's] birth. The pauper further stated, that he had done no act to gain a settlement. The court of Quarter Sessions being of opinion that there was sufficient evidence of the pauper's birth in E. confirmed the order removing him thither, but the court of K. B. being of a contrary opinion, quashed both orders. Rex *v.* Erith, Trin. 47 Geo. III. 8 East, 530.

(2) Rex *v.* Creech St. Michael, Burr. S. C. 765, especially if the presumption is strengthened by a correspondence between the date and the pauper's age.

By the law of the land, no man can be a bastard who is born after marriage, unless for special matter (1). If therefore a man marries a woman that is with child, it raises a presumption that the child is his own; for by marrying one whom he knows to be in that situation, he may be considered as acknowledging, by a most solemn act, that the child is his (2), and it will be legitimate.

Proof of illegitimacy.

But this presumption of legitimacy may be rebutted, as will be seen in considering the facts upon which illegitimacy depends, which are to be classed as follows:

1. Where no marriage.

1. Where either no marriage exists, or only an informal one, before the child is born. (3)

2. When the husband is alive.

2. Where a marriage subsists, and the husband is alive *when it is born.*

3. When dead.

3. Where he dies *before it is born.*

Legitimacy, in the second case, depends chiefly upon the fact of the husband's access to his wife; for where that has taken place, the issue will be legitimate, although the woman is proved to have been ever so unfaithful to the nuptial bed (4). Access shall be presumed, even in cases where there has been a voluntary separation between husband and wife; and it requires strong and almost irrefragable evidence to shew that it has not taken place (5); for the general presumption *quod pater est quem nuptiæ demonstrant* shall prevail, "except a case of plain natural impossibility is shewn." (6)

Access presumed.

The evidence by which illegitimacy is to be proved in this case is reducible under four heads:

(1) 1 Roll. Abr. 358. Bastard, B.
(2) Per Lawrence, J. Rex *v.* Luffe, 8 East, 210.
(3) Ante, p. 261, &c.
(4) Rex *v.* Brown, 2 Stra. 811.
(5) 1 Black. Com. 457.
(6) Per Lord Ellenbourgh, C. J. Rex *v.* Luffe, 8 East, 207.

First and anciently, almost the only proof of non-access, was the child's being conceived and born while the husband continued beyond the four seas. (1) 1. When beyond four seas.

Secondly, where there is a divorce *a mensâ et thoro:* for obedience to the ecclesiastical sentence shall be presumed. (2) 2. Divorce.

The third arises from the explosion of the old opinion, that if the husband is within the four seas the child is legitimate. Wherever therefore it is a manifest physical impossibility that the husband can have procreated the child, it shall be deemed a bastard. Thus if it can be proved *by clear evidence*, that the husband has not had access during the entire period of gestation (3), the child is a bastard. Neither is it necessary in this case, (at least where the parties have been long dead,) to establish non-access by witnesses who can prove *him constantly* resident away from his wife. Proof that the husband left Norwich, and went to reside in London, that his wife remained behind, and lived with another man as his wife for years, during which time the child in question was born; that this child always went by the adulterer's name, and was reputed illegitimate in the family; has been held sufficient evidence of illegitimacy, though it did not clearly appear where the real husband had been from the time of conception to that of delivery (4). So also if the husband be proved beyond seas until within a fortnight of 3. Direct evidence.

(1) Rex *v.* Alberton, 1. Ld. Raym. 395. 2 Salk. 483. According to this case, the husband must have been absent, not only at the time of conception and birth, but during the entire period of gestation.—But this doctrine is contradicted by several cases, and expressly overruled in Rex *v.* Luffe, ante, n. 294. (2)

(2) 1 Black. Com. 457. Bull. N. P. 112. See also Rex *v.* Kempson, 1 Bott, 378. Pl. 443. St. George *v.* St. Margaret's Westminster, 1 Salk. 123. 1 Const. 452. Pl. 123.

(3) Rex *v.* St. Bride's, 1 Str. 51. Pendrel *v.* Pendrel, 2 Str. 925. Rex *v.* Bedall, 2 Str. 1073. Rex *v.* Maidstone, 12 East, 550. where the husband was abroad for two years previous to the child's birth, and the mother continued in England.

(4) Thompson *v.* Saul, 4 Term Rep. 356.

his wife's delivery, the child is a bastard; absence during the entire period of pregnancy being immaterial, where the circumstances of the case demonstrate a natural impossibility that the husband can be the father. (1)

4. Inability.

Lastly, upon the same principle of physical impossibility it has been long settled, that if the husband be only eight years old (2); or if a man who is infirm and bedridden marries a pregnant woman in his chamber, and she is delivered twelve weeks after; the issue is bastard (3). But the evidence must go to an impossibility; for improbability, arising from a bad habit of body, is insufficient. (4)

3. When father dies before the birth.

The third situation which may give rise to the question of illegitimacy is, where there has been a marriage, and the husband dies *before the issue is born.*

If the child comes into the world within the usual period of gestation, *i. e.* forty weeks, it is in general to be

(1) Rex *v.* Luffe, 8 East, 193. Rex *v.* Maidstone, 12 East, 550.

(2) So if the husband be but 9 years old, but Rolle adds a quære, 1 Roll. Abr. 359. Bastard, Pl. 17. But "there is a case in the year-book, 1 H. 6. 3. b. which goes the length of deciding the issue to be a bastard, where the husband was within the age of 14." Per Lord Ellenborough, C. J. Rex *v.* Luffe, ante, 294. n. (6)

(3) Foxcraft's case, 1 Roll. Abr. 359. 1 Bott, 445. Pl. 552. In this case it must be presumed to have been shown that he had no previous access during the pregnancy. See Mr. East's note, Rex *v.* Luffe, 8 East, 200. It seems questionable, however, whether this case did not turn upon the irregularity of the marriage. Rolle cites many subsequent determinations in which the child has been held legitimate under even more extravagant circumstances. "A woman being with child by one, is married to another, and afterwards issue is born, it is legitimate though born within 7 days after the marriage." 1 Roll. 358. (B). Pl. 3. If a married woman goes into another country and marries a second husband, has issue by him, the first husband being within the seas, the issue is legitimate, Ib. pl. 6. But this law is now exploded.

(4) Lomax *v.* Holmden, 2 Str. 940. 1 Bott, 447. pl. 560. There must be a physical impossibility of the husband's being the father, for upon the ground of improbability, however strong, I should not venture to proceed. Per Lord Ellenborough, C. J. Rex *v.* Luffe, 8 East, 207.

deemed

deemed legitimate; if beyond, a bastard (1). But in the opinion of medical persons, this period may be accelerated or retarded by accidental causes; and upon their testimony, judging from the particular facts of the case, a child was held legitimate, though born forty-weeks and nine days after the husband's decease. (2)

If a man die, and his widow soon after marry again, and a child is born within such time as renders it dubious, from the course of nature, to which husband it belongs; the issue is said to be more than ordinarily legitimate, and may, upon arriving at the years of discretion, choose which of the fathers it pleases. (3)

Proof, by what witnesses.

As to the witnesses by whom the fact of illegitimacy may be proved, not only all other persons, but the father or mother may be called, for they are not directly interested in the question of their child's settlement.

Parents' evidence.

They may therefore prove, 1. The fact or time of marriage. (4)

2. Its formality or informality. (5)

3. Whether a child is born subsequent or prior to a marriage had between them. (6)

(1) Radwell's case, Co. Litt. 124, b. Lord Hale's MSS. Ibid. It seems also to have been found, that the husband had no access for the month before his death, having languished of a fever during that time. 1 Roll Abr. 356. Per Lord Ellenborough, C. J. Rex *v.* Luffe, ante, 296. n. (4)

(2) Alsop *v.* Bowtrell, Cro. Jac. 541.

(3) 1 Bott, 444. Pl. 550. 21 Ed. III. Pl. 39.

(4) Rex *v.* St. Peter's, Burr. S. C. 25. Stapylton *v.* Stapylton, Cas. temp. Hard. 277. May *v.* May, Bull, N. P. 112. Sacheverell *v.* Sacheverell, Ib. 241. 287. Lord Valentia's case, Cowp 593.

(5) Standen *v.* Standen, Peake's Ni. Pri. Ca. 32. Rex *v.* Bramley, 6 Term Rep. 330. And see Wilkinson *v.* Payne, 4 Term Rep. 468. ante, 272.

(6) Stevens *v.* Moss, Cowp. 591.

4. But

4. But where a child appears to have been born *in wedlock*, the evidence of the parents, especially of the mother who is the offending party, is inadmissible to prove the non-access of the husband, and bastardize the issue (1). And it makes no difference that the father is dead at the time when the wife is examined, for the rule is grounded upon the general principle of public policy, affecting the children born during marriage as well as the parties themselves. (2)

5. Yet where the child is so born, the mother is an admissible witness to prove the fact of her adultery, because from the nature of the transaction it is usually carried on with such secrecy, as to admit of no other evidence. (3)

6. Proof of the parent's declaration on oath or otherwise is evidence after their decease of the fact of marriage and the time of birth. (4)

7. Where a divorce can be proved by parol, and the production of the sentence of a court is unnecessary; as where it is done abroad by an unwritten judgment, and according to the forms of some foreign law, the parties are evidence to prove the fact. (5)

(1) Per Lord Mansfield, Stevens *v.* Moss, Cowp. 593. Rex *v.* Reading, infra, (3). Rex *v.* Luffe, ante, 296. n. (4), and decided, Rex *v.* Kea, 11 East, 132. But see Clark *v.* Wright, 1 Bott, 447. Pl. 558. Rex *v.* Bedall, infra, n. (3). But the wife being examined to prove non-access does not vitiate an order of bastardy if the fact be proved by other witnesses. Rex *v.* Bedall. Rex *v.* Luffe, ante.

(2) Rex *v.* Kea, 11 East, 132.

(3) Rex *v.* Reading, Cas. temp. Hard. 79. 1 Bott, 448. Pl. 562. Rex *v.* Bedall, Ib. 453. Pl. 564. 2 Str. 1076. Stevens *v.* Moss, ante, 297. n. (6). Rex *v.* Luffe, 8 East, 193.

(4) Anon. 12 Vin. 247. [T. b. 91.] Rex *v.* Bramley, ante, 297. n. (5).

(5) Ganer *v.* Lady Lanesborough, Peake's Ni. Pri. Ca. 18. ante, 273.

CHAPTER XX.

Of Settlement by Hiring and Service.

SECT. I.

Division of the Subject.

THE first statute which required a further qualification to confer a settlement beyond mere residence as a servant for the space of forty days, was 3 W. III. chap. 11. sect. 6. It enacts, that if any *unmarried* person, not having *child or children*, shall be lawfully *hired* into any parish or town for one year, *such service* shall be adjudged and deemed a good settlement therein. 3 W. III. c. 11. construction of.

This section describes, first, the persons who shall be capable of gaining a settlement by hiring; it next requires that the hiring shall be for a year; and lastly, that it shall be in a "parish or township."

But the words "such service," having no regular antecedent, it was difficult to ascertain for what period the service was intended to continue. It might, and possibly with little violence, have been construed to signify a service commensurate with, and under that yearly hiring, which is required in the very same clause, since there was nothing else in the sentence to which these words could refer. But it was held to make no further alteration in the law of settlements, than requiring a *bona fide* contract for a year's service, which the parties were left to enforce at their discretion. A settlement therefore was gained by entering into this yearly agreement as a servant joined with residence as such for forty days.

Reference

Reference to the remaining ways of acquiring settlements, in which nothing is necessary beyond residence for forty days in a particular capacity, seems to have given rise to this construction. The case of apprentices bore a strong analogy to that of servants. Nothing further was required to gain a settlement by apprenticeship, than a contract by indenture, and residence under it during forty days. A similar contract for a year's service, with a like performance of service, may from an observance of the same rule have been deemed equally sufficient to confer one in the case of hiring and service.

This interpretation of the statute produced great inconvenience. Fraudulent hirings to persons unable to maintain or employ a servant were entered into, that paupers might be retained in particular parishes. The actual service, which was the substantial consideration supposed to be paid to the parish for the burthens of a settlement, remained unperformed. If a servant was discharged by collusion, or through misconduct, after the lapse of his forty days, he was thrown a more speedy and permanent incumbrance upon the parish than where the service was honestly performed.

8 & 9 W. III. c. 30.

To remove these inconveniences, a clause was introduced in 8 & 9 W. III. c. 30. which provides, that no person so hired as aforesaid, shall be judged or deemed to have a good settlement in any such parish, or township, "unless such person shall continue and abide in the same "service for the space of one whole year."

Distribution of subject.

Of these statutes, when taken separately, the first regulates three things, namely, the description of persons by whom a settlement may be gained; the lawful hiring for a year; and the place into which the servant is to be hired. The second prescribes the service, and the abiding

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and continuance therein for the space of an entire year. When considered together as part of the same code, a further question arises upon them, of how far the service made necessary by the one, need be performed under the contract of hiring required by the other?

This branch of settlement law may be considered therefore under the four following general heads:

1. What persons are capable of gaining a settlement by hiring and service.

2. The contract of hiring.

3. The year's service.

4. The residence by, and place in which the settlement is gained.

SECT. II.

What Persons are capable of acquiring a Settlement by Hiring and Service.

Unmarried.

THE words of 3 W. III. c. 11. are, that "if any unmarried person, not having child or children, shall be "lawfully hired," &c.

It has been held, that the period at which the statute requires the party to be unmarried, is the time when the contract is made. Therefore, if a servant marries during service (1), or even after the hiring,

(1) Farringdon *v.* Witty, Salk. 527; Rex *v.* Clent, Fol. 148. Rex *v.* Sutton, 2 Sess. Cass. 133. Rex *v.* Hanbury, Burr. S. C. 322. See also Rex *v.* Hedsor, Cald. 51. Rex *v.* Nympsfield, Cald. 107. Rex *v.* Great Bookham, 2 Const, 292. n. (a).

but

but before his year begins (1), it will not prevent his settlement. Neither does it make any difference, that both parties think the servant married at the time of hiring; as where the husband being abroad, died before the wife entered upon her second year's service, and she was unacquainted with the fact (2); or although they know that the servant is to be married before his service commences. (3)

The servant's being married at the time of making the agreement is likewise immaterial, if he be single, when it becomes absolute and complete. As where a married man was hired conditionally on the 16th, to serve for a year from the 24th of the month, if the intended master should approve the terms; and his wife died in the intermediate time: he was held to gain a settlement by a year's service; for the master had a power to dissent until the 24th, when the servant was unmarried, and the hiring was considered as taking place on that day. (4)

Without children.

The second qualification required by the statute is, that the servant should not have any child or children at the time of hiring. This is adjudged to mean children, who, by following their parent's settlement, might become chargeable to that parish in which one may be acquired under the new servitude. So that, if legitimate children are emancipated at the time from which the parent engages to serve, he may gain a settlement (5). But they must be emancipated at the commencement of his contract for that particular year's service under which

(1) Rex *v.* Allendale, 3 Term Rep. 382. Rex *v.* Stannington, 3 Term Rep. 385.

(2) Rex *v.* Hensingham, Cald. 206.

(3) Rex *v.* Allendale, supra, n. (1).

(4) Rex *v.* Banknewton, Burr. S.C. 455. That the service for the last 40 days must be performed under a contract of hiring entered into when the pauper is unmarried, see post. sect. 4.

(5) Anthony *v.* Cardigan, Fort. 309. Fol. 131. S. C.

the

the settlement is sought to be obtained (1). The child's entering into a contract by which, if completed, he may gain a settlement, and thereby become emancipated, does not qualify the parent for obtaining one. Thus, where a father having a son, who had not acquired a settlement, hired himself for a year, and the son was also hired for the same period, on the same day, and both served their time; the father gains no settlement, as not being a person "not having a child" within the meaning of the act; for the son's contract of service might not have been completed, in which event he could not have gained a settlement, and therefore at the time when the father entered into the relation of servant, the son constituted a part of his family. (2)

SECT III.

Of the Contract of Hiring.

Parties to the contract.

MANY parts of the agreement of hiring, which are of most importance to the master and servant, have but small relation to the question of settlement.

All contracts are made between at least two contracting parties, which implies that they should not only be of sufficient understanding to contract, but that the person engaging as a servant should be disencumbered from any other relation which renders the engagement unlawful. Upon this last principle it has been held, that neither a deserter from the king's service, nor an apprentice, can lawfully hire himself so as to acquire a settlement during the continuance of those several relations to the crown or a master. (3)

(1) See Rex *v.* Cowhoneyborne, 10 East, 88.

(2) Rex *v.* New Forest, 5 Term Rep. 478.

(3) Rex *v.* Norton, 9 East, 206.

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It is immaterial whether the agreement be to serve one or more masters (1); or is made by a third person, if subsequently ratified by the parties (2). Neither is it necessary that they should be of full age, if the engagement is entered into with the parent's consent, and the pauper adopts it afterwards (3); but it must be so ratified: and therefore parish officers can neither hire out adult (4), nor infant paupers (5), unless such pauper afterwards adopts the contract (6). It is of no importance whether the master has a settlement in the parish; for the servant does not derive his settlement from the master, but from the service. (7)

The degree of relationship or consanguinity also makes no distinction, unless, as is the case of husband and wife, it is inconsistent with the formation of the contract itself. The agreement by a daughter, who was emancipated, to perform the offices of a servant to her father for a certain reward, is equally within the statute, as where the parties are strangers to each other in blood and connection. (8)

Wages and service.

The nature of the service is likewise immaterial. It may be extended to all sorts of work, or confined to a particular sort (9). The servant may live out of the house during the entire of his service (10); or for part of the time in, and part out (11); it is still an hiring within the

(1) Rex *v.* Eldersley, 2 Bott. 274. Pl. 317. Rex *v.* Elstack. Cald. 489. post. 329.

(2) Per Lord Kenyon, Rex *v.* St. Matthew's Ipswich, 3 Term Rep. 449. Rex *v.* Rushall, post. 317. (2).

(3) See Rex *v.* Wintersett, Cald. 298. Rex *v.* Macclesfield, Burr. S.C. 458. Rex *v.* Wincaunton, 2 Const. 195. Pl. 255. for an infant's contract is not absolutely void, but only voidable at his own election, Ib. and Holt *v.* Ward, 2 Str. 937. Per Lord Ellenborough, C. J. Rex *v.* Shinfield, 14 East, 545.

(4) Rex *v.* Rickinghall Inferior, 7 East, 373.

(5) Rex *v.* Stowmarket, 9 East, 211.

(6) Rex *v.* Norton, 9 East, 206.

(7) Chesham *v.* Missenden. Fol. 142.

(8) Supra, n. (7); and Rex *v.* Chertsey, 2 Term Rep. 37.

(9) Rex *v.* St. Agnes, Burr. S. C. 671.

(10) Rex *v.* King's Norton, Burr. S. C. 152.

(11) Rex *v.* Sutton, 1 East, 656.

statute,

statute, provided he remains under his master's controul during the whole time of the contract. Equally unimportant is the nature of the wages to be received; they may be in money, or in kind, or instruction (1), or in part of the servant's earnings (2), or in victuals and clothes (3); or either, or even none of these (4), provided an actual contract exists. In the same manner they may be payable either by the week (5), the year, the piece, or the gross (6); and any alteration in these particulars during the year, which does not put an end to the contract, is also immaterial. These circumstances will often prove important clues towards ascertaining the time for which the hiring is made, or the degree of controul which it gives the master over his servant, where they do not expressly appear from the terms of the contract itself; but where these are ascertained, the former make no variation in the law of settlement.

Requisites in a contract of hiring.

The following are the principal rules to be observed relative to the contract of hiring in cases of settlement: 1. there must be a contract; 2. it must be a contract for servitude, and intended only as such; 3. it must be an entire contract for at least a complete year's prospective service; 4. it must contain no special exception, exempting the servant from his master's controul during its continuance.

1. Must be a contract.

The 3 W. & M. c. 11. s. 6. requires that the person shall be lawfully hired; it is necessary therefore that an agreement, imposing the reciprocal obligation of master and servant, should subsist between the parties (7). But

(1) Rex *v.* Hitcham, Burr. S.C. 489.

(2) Rex *v.* Little Bolton, Cald. 367.

(3) Rex *v.* Worfield, post. 324. (3). Wandsworth *v.* Putney, post: 327. (2).

(4) Rex *v.* Bath Easton, post. 324. Per Lord Kenyon, C. J. Rex *v.* St. Matthew's Ipswich, 3 Term Rep. 449.

(5) Rex *v.* Winchcombe, Dougl. 391.

(6) Rex *v.* Birmingham, Dougl. 333.

(7) Gregory Stoke *v.* Pitminster, 2 Bott, 179. Pl. 233.; and see the cases cited infra.

it is sufficient if the contract is made in an extraparochial place, although the words of the act refer to an hiring "into a parish or township." (1)

Such agreement may be either *express* or *implied.*

Express contracts.

An express agreement may be in writing (2), or by word of mouth; it requires in neither case any technical form of expression to render it valid. Like all other contracts, it is to be interpreted according to its general purport, so that if the intention to bargain for a year's service be clear, no matter in what terms it is expressed. Thus an hiring for eleven months, for 4l. 10s., it being agreed at the time between the servant and master, that the servant should give a month's service in beyond the eleven months, is an hiring for a year; for it is in substance an agreement to serve for twelve months. The variation in expression is of no significance, and cannot avail to prevent the gaining a settlement. (3)

If the original terms are equivocal they may be explained by the subsequent conduct of the parties. On the 17th of October the pauper was hired to serve "for the year, at 9s. 6d. per week." He served under that hiring and received his wages weekly until the 13th of October following, when he had a conversation with his master and agreed to serve him for another year at 10s. per week. On the 20th October he received 10s., concerning which no explanation took place; but the pauper said he received it under the new hiring. He continued in the service all that year, and seven weeks after; he was married eight weeks after the first hiring. The court thought

(1) Rex *v.* St. Peter's in Oxford, Fol. 193. post.

(2) Pawlet *v.* Burnham, 2 Bott, 307. Pl. 347.

(3) Rex *v.* Milwich, Burr. S. C. 433.; and see the opinion of Lord Kenyon, Rex *v.* Macclesfield, 3 Term Rep. 76. and of Buller, J. Rex *v.* Mursley, 1 Term Rep. 694.

that

that strictly speaking it was a question of fact whether the first contract was intended to be for the space of a year, or only to the end of the current year; but however equivocal the expression might have been at first, when the master and servant on the 13th of October in the following year spoke of a contract for *another* year, that shewed that they had originally intended a yearly hiring. (1)

Also where an hiring is stated, the court will presume it to be regular unless the contrary appears. (2)

2. Implied contracts.

An implied agreement of hiring is a contract which the law infers to have taken place between the parties, where an express one does not appear. The mere exercise of controul, and the performance of service between persons otherwise independent, is sufficient to support this inference, since it is only from an agreement either expressly entered into, or tacitly understood, that the one can derive his right to command, or the other be induced to obey.

Evidence of implied hirings,

Thus the mere acts of service, either in husbandry (3), or as a menial servant (4), or as an ostler (5), are sufficient to warrant the inference of a contract of hiring. So where an express contract has existed, and expired, if the servant continues the succeeding year with his master, without coming to any other agreement, the law implies, from the fact of service, an agreement to serve for that year on the same terms (6); and that although the pre-

(1) Rex *v.* Overnorton, 15 East, 347. Rex *v.* Seaton and Beer, Cald. 440. S. P. and post. 328.

(2) In Rex *v.* Weyhill, Burr. S. C. 185.

(3) Rex *v.* Lyth, 5 Term Rep. 327.

(4) Rex *v.* Long Whatton, 5 Term Rep. 447. Rex *v.* Hales, 5 Term Rep. 668.

(5) Rex *v.* Holy Trinity in Wareham, Cald. 141.

(6) Rex *v.* St. Giles Reading, Cald. 54. Rex *v.* Hensingham, ante, 302.

(2). Rex *v.* Cowhoneybourne, 10 East, 88.

after an invalid agreement;

vious contract was under unstamped articles of agreement to work with his master for three years at so much per week, to increase in the successive years. For a contract of a yearly hiring is to be presumed from a subsequent service for four years; and though the court cannot look at the unstamped instrument for the purpose of proving by it any agreement between the parties, they may look at it to see the duration of the first contract, in order to guide them in receiving parol evidence of the subsequent service to which it did not apply. (1)

rebutted by circumstances.

The fact of servitude however is no more than evidence from whence a contract of hiring may be presumed (2). It may be rebutted therefore by a disclosure of any circumstances which shew that the parties did not stand in the relation of master and servant.

A foothoy residing with a barber.

A gentleman sent a lad who had lived with him three years, and gained a settlement as his foot-boy, to reside with a barber inhabiting another parish, to learn the art of shaving and dressing hair; he gave this master some money to teach him, who was also to have the benefit of his work. The pauper lived under this agreement for more than a year; but it conferred no settlement, for he was in the nature of a scholar and not of a servant, and the barber had no remedy to compel him to serve. (3)

A boy taken in charity.

Mr. Pyke, who was a mortgagee of a small estate, took the mortgagor's son into his family from charity; *there was no contract as to service*, or the pauper's continuance with Pyke, and he got meat, drink, lodging, and clothes, but no wages. He lived there four years, doing whatever the servants of the house thought fit to bid him,

(1) Rex *v.* Pendleton, 15 East, 449.
(2) Ante, 307. n. (3), (4).
(3) Rex *v.* Walton, Carth. 400.

and

and left his master at the age of fourteen. It was considered as not being an hiring to confer a settlement, the justices having found that there was no contract. (1)

A boy living with his uncle.

Where a boy had lived with his uncle *as a relation, and not under any hiring;* he was afterwards hired by another person as a yearly servant, but returned to his uncle, upon his request by letter, saying, that if he would come and live with him *as before*, he could surely make it as good or better for him than a common service. There was no agreement with the uncle after his return, either as to time or consideration of service; but the uncle often promised, that if he would stay with him for his life, he would leave him his crop, farm, and stock. He lived with his uncle several years, by whom he was found in meat, clothes, and pocket-money, but received no wages. He gained no settlement, for there was no hiring during the first service, and the terms of coming to live with him *as before*, negative the presumption of such a contract during the second. (2)

The helper to a waiter.

A waiter to an inn being taken ill, sent for the pauper *to help him*; which he did, and continued in the inn as boot-catcher for 19 months, lodging and boarding there, and was to be satisfied by the gentlemen who came to the house. The master knew of his being there the night after his coming, but nothing passed between them at that time. The waiter continued in the service eleven months after the pauper came there, and the latter remained for six months subsequent to his going away; the master employed him occasionally on errands, &c. The pauper on going away applied to the master to give him something for the time he had been there, who refused, alleging he had made no agreement with him; but after-

(1) Rex *v.* Weyhill, Burr. S. C. 421.

(2) Rex *v.* Stokesley, 6 Term. Rep. 757.

wards gave him two guineas. The court were of opinion that there was no hiring with the master during the time the waiter continued at the inn, the pauper being then helper *to him;* and though the last six months of the service is to be referred to an implied contract with the master, that is insufficient to confer a settlement, for there is no contract, either express or implied, with him until these last six months. (1)

The inference of a contract from the performance of acts of service, may be repelled by evidence of the previous situation of the parties:

A negro woman.

As where a negro woman, who had been purchased as a slave in America, came to England in her master's family, where she continued to live during his life, in the capacity of a servant, and for some time afterwards with his widow and executrix. The situation of the woman, previous to her arrival in England, negatived the presumption which might have arisen from her service, and the court held that she gained no settlement, for there was no contract of hiring. (2)

So if the parties stand in a degree of relationship towards each other, which accounts for the reciprocal acts of service and maintenance, without reference to a contract for service, it seems to have considerable weight in excluding the presumption.

Young girl residing with her relation by agreement.

As where a young girl was sent to by a relation, who told her, that if she would live with her she should have

(1) Rex *v.* St. Matthew's Ipswich, 3 Term Rep. 449. Lord Kenyon goes on to observe, "If, indeed, the pauper had been before in R.'s service, and then lived under a yearly hiring, making in the whole a year's service, that would have gained him a settlement."

(2) Rex *v.* Thames Ditton, Cald. 516. None of the statutes respecting the poor law apply at all to villenage; the legislature never thought of it. Per Lord Mansfield, C. J. Ibid.

meat,

meat, drink, washing and lodging; and the girl accepted the terms, and lived with her *as a servant* for four years. It was adjudged to be no contract to confer a settlement; for this is no agreement, but an encouragement to the poor girl, that if she would live with a relation, she would maintain her. (1)

A boy with his uncle.

Likewise, when a boy went to live with his uncle, who was a tailor, at the age of eleven or twelve, worked for him two years and learned the business; when the uncle proposed to take him an apprentice, which the boy refused, but continued to work for him until he was 17 years old; the uncle providing him with board, lodging, and necessaries: the court were of opinion, without argument, that he gained no settlement, for there was no hiring. (2)

Pauper put out by parish.

H. S. was disabled by the loss of a leg, when the parish officers of R. where he was settled, agreed with R. C. who resided in another parish, that H. S. should live with him and do for him whatever he set him about; the parish to pay C. 2s. 6d. per week, and C. to find board, lodging, and washing for S. They lived together until Christmas, when C. refused to keep him longer, unless the parish increased the allowance. The officers consenting, C. agreed to take S. till the Easter following, at which time the parish refusing to continue the allowance, C. sent S. home to R. whence he returned to C. and continued to live with him in the same manner as before

(1) Gregory Stoke *v.* Pitminster, 2 Bott, 179. Pl. 233. But Lord Kenyon observes upon this case, "that it "was determined early in the reign "of George II. when these questions "were not discussed or understood so "well as they are at present." Rex *v.* Worsfield, 5 Term Rep. 506.

George II. seems a mistake of the reporter for George I. in the 13th year of whose reign it is reported to have been decided. See also Rex *v.* Lyth, 5 Term Rep. 327.

(2) Rex *v.* St. Mary's Guildford, Cald. 521.

for more than two years. The court were clearly of opinion that he gained no settlement. The relation of master and servant never existed between S. and C. The former was placed with C. by the parish officers to be maintained by him, and the parish officers had no authority to hire him out. After the parish allowance was withdrawn, C. permitted S. to live with him out of charity, without any contract as between master and servant. (1)

Alloted.

The guardian for the poor of an incorporated hundred, instead of binding out poor children, allotted them to yearly services within the parishes of the hundred: A poor boy aged 14, and residing in the house of industry was thus allotted to F., a farmer in the district: the guardian told the boy that he had procured him a service with F.; and the boy did not object, conceiving he had no discretion on the subject. On the day after Michaelmas he went to F., who received him, and told him he would give him clothes, and that he was to stay with him a year; which the pauper did, receiving clothes, maintenance, and pocket-money. This is not a hiring to confer a settlement. The adoption of a contract must be the act of a free agent. The boy conceiving he had no discretion on this subject, was obliged to accept the service as being under the control of others; and cannot be considered as having adopted the act of his master. (2)

Put out with his own consent.

But though the law says that an overseer cannot contract with another for the services of a pauper without his consent, an overseer may furnish a boy with means to enable him to make a contract of hiring with another.

(1) Rex *v.* Rickinghall Inferior, 7 East, 373.

(2) Rex *v.* Stowmarket, 9 East, 211.

A poor

A poor boy aged 16, belonging to the parish of A. offered to serve S., a parishioner of I., who asked him whether he was willing to bind hay, thatch, or do whatever he was bidden: the boy said he was willing, and was taken home to I.; a day or two afterwards S. told him, if you can't get clothes I can't keep you, when the boy said that the overseer of D. would find him clothes; and the next day he accompanied his master to the overseer, who agreed to do so, but stipulated with the master that he should allow the parish 1s. per week on account of the clothes found. The overseer at the same time asked the boy in his master's presence if he went willingly into his master's service, to which he assented. This was an original agreement, for an hiring and service between the master and the boy before the overseer knew any thing of the matter, and service under it for a year confers a settlement. (1)

2. Must be a contract for service.

The second circumstance required in this contract to confer a settlement is, that it should be for servitude, and intended only as such. An agreement designed to place the parties in the relation of master and apprentice is insufficient, although it entitles the former to exercise an equal control over the person submitted to his authority.

Service as apprentice.

The 3 W. & M. c. 11. and 8 & 9 W. III. c. 3. expressly require that the party is to be *hired to serve*. Not only an apprentice regularly indentured, therefore, cannot during the continuance of his apprenticeship acquire a settlement as a servant; but those who serve as apprentices, without any indentures, or under such as are null and void for informality, cannot claim one, as if their service had taken place under a contract for servitude.

(1) Rex *v.* Dunton, 16 East, 352.

So

So that whenever the forms required to confer a settlement by apprenticeship have not been observed, it becomes necessary to inquire whether the person claiming a settlement has been hired as a servant, or engaged as an apprentice (1). It is not always easy to ascertain this fact; for a servant may hire himself for the purpose of being instructed in some particular business, as well as an apprentice.

This subject comes more regularly under discussion in treating of settlements by apprenticeship; and it is sufficient for the present to elucidate the rule by the following cases: —

The pauper agreed to let himself to his brother, who was a carpenter, for a year; by his agreement he was to receive no money by way of wages, but his brother was to teach him as much as he could of the trade during the time, and provide him with meat, drink, washing, and lodging, the pauper to do all his brother's lawful business in his farming way. This has been held a contract for service and an hiring for a year. (2)

But an agreement with a stone-mason *to take the pauper apprentice for six years, and to teach him the trade*, and provide him with meat, drink, washing, lodging, and clothing; the pauper to live and work with him as an apprentice, and *indentures to be executed between them accordingly;* will not entitle the pauper to a settlement, the indenture never having been executed. (3)

(1) But an invalid contract of apprenticeship by a minor, does not destroy a valid contract of hiring previously entered into. Rex. *v.* Shinfield, 14 East, 541. post.

(2) Rex *v.* Hitcham, Burr. S. C. 498.

(3) Rex *v.* Whitechurch Canonicorum, Burr. S. C. 540.

These

These cases correspond with each other in almost every particular, except that the agreement in one was to work as a servant, and in the other as an apprentice. Upon that distinction, the pauper in the latter was held not to gain a settlement; because he was not an apprentice for want of a binding by deed, and therefore not settled in that capacity; and he was not an hired servant, as the agreement declares that he was to be an apprentice: he cannot therefore resort to this branch of the statute, when the terms of his contract prove that he meant to come in under another, to which different provisions are applicable.

3. Must be an entire contract for a year's prospective service.

The third circumstance essential to the validity of the contract, respects the time for which the service is to last. The distinctions upon this head have given birth to a number of denominations, which it is necessary to explain, rather to enable the reader to refer to the several collections of cases upon this subject, than for any use made of them by the learned judges in delivering their opinions. Such are *successive or several hirings; customary hirings; retrospective hirings; conditional hirings; special or particular hirings.* These terms will be severally defined, in unfolding the distinctions from which they have originated.

Time of making contract material.

With respect to the time for which the contract is made, it is necessary in many instances to ascertain the period at which it is to commence, as well as that for which it is to continue. The former may be useful in some instances, not only as conducing to determine the latter, but likewise upon other accounts. Thus it may be important to shew, whether the servant was incapable of acquiring a settlement when hired (1); or

(1) Ante, 301.

whether

whether absence at the commencement of his service arises from a dispensation with the service, the contract being previously completed, or from the parties not having fully concluded their agreement until a subsequent period. (1)

The pauper being in service with W. wrote to her mother, desiring her to look out for a place for her, who in consequence, previous to old Michaelmas, treated with Mr. P.'s wife, of the parish of R. Mrs. P. informed the mother that she would give her daughter the same wages as she did her other servants, and wait till she came down, and desired her to come as quickly as she could. But the mother made no absolute agreement for her daughter, but afterwards informed her that she had got a place for her, if she liked it. The pauper left W. at the expiration of her service, came to R. on the 16th of October, and went into Mrs. P.'s service, at her request on the 18th, when it was for the first time agreed between Mrs. P. and her that the wages should be ten guineas, with liberty of parting at a month's wages or a month's warning. This is a hiring to commence from the 18th, there was no reference to any antecedent time, the terms not being settled nor the agreement made until then. (2)

But where Mrs. M. sent a letter to the pauper's friends, stating that she gave 3l. a year wages, on which the pauper agreed to go, and sent to let her mistress know when she would come; and in consequence of a second letter, desiring her to come the 11th of October, she went into the service on the 12th, when her mistress objected to her not having come the day before, for which

(1) Rex *v.* Wintersett, Cald. 298. post. 328. (1). Rex *v.* Grendon Underwood, Cald. 359. andmany other cases respecting dispensations of service, and dissolutions of the contract.

(2) Rex *v.* Rushall, 7 East, 471.

the

the pauper gave as a reason that she had only quitted her last place late on old Michaelmas-day. About three weeks after she went, the pauper said to her mistress that it was proper to come to some agreement, as they never had any, further than a few lines: to which her mistress answered, "You know what wages; I sent you word: "and as the general way is to let for a month's wages or "a month's warning, I do not wish to confine you for a "year." The pauper continued in the service till new Michaelmas then following, and it was taken for granted in arguing the case, that the hiring was complete on the 11th of October. (1)

Successive hirings.

There must be one entire contract for a complete year's service. Successive hirings, or such as follow each other, in uninterrupted succession, without an intervening interval of time, if *severally* less than a year, are insufficient to confer a settlement, although they amount to a much longer period of service, when taken together.

Thus an hiring for two successive periods of eleven months each (2); or for two successive half-years (3); or from May-tide to Lady-day, and a new agreement on Lady-day to serve till the May-tide ensuing, is insufficient. (4)

The same point was held, where the hiring was from Whitsuntide to Martinmas, *and before the expiration of that term* there was an hiring to the same master for the succeeding half-year, from the said Martinmas to the Whitsuntide following (5). Neither did it make any dif-

(1) Rex *v.* St. Peter's Mancroft, 8 Term Rep. 477.

(2) Rex *v.* Haughton, 1 Stra. 83. In this case a week, during which the servant was absent, intervened between the successive hirings.

(3) Dunsford *v.* Ridgwick, Salk. 535.

(4) Horsham *v.* Shipley, Fol. 134.

(5) Rex *v.* Lowther, Burr. S. C. 674.

ference

Customary adjudications in sessions affect not.

ference in the latter case, that it was a customary or general mode of hiring servants in that part of the country, and that the case set forth, that in Cumberland the quarter sessions (from whence it was stated), had by invariable practice as long as can be remembered, adjudged an hiring for two successive half-years, and service under it for a whole year, to be a settlement, for the words of the act are positive that the hiring shall be for a year.

Must be for a whole year.

So where there is but one contract, if it be made but for a day or two short of a year, it is not the hiring required by the statute; therefore an hiring from the 3d of October until Michaelmas day ensuing is insufficient. (1)

Where there was an hiring three days after old Michaelmas, until the next Michaelmas, and the pauper continued in the service until the day after old Michaelmas-day, which being leap-year, made a service of three hundred and sixty-five days; the court was clearly of opinion against the settlement, because there was no hiring for a year; for a contract made three days after Michaelmas, to serve till the Michaelmas following, is an hiring two days short of a year. (2)

Customary hirings.

And its being the customary mode of hiring in that part of the country makes no alteration in the law. Where it was the custom for servants to hire by the year at two different statutes, the one held on the Friday before and the other on the Friday after old Martinmas day, and the servant was hired from the Friday after, until the old Martinmas following; it was adjudged insuffi-

(1) Pepperharrow *v.* Frencham, Fol. 135.; and see Coombe *v.* Westwoodhey, 1 Stra. 143. Rex *v.* Newton, Burr. S. C. 157.

(2) Rex *v.* Ackley, 3 Term Rep. 250. Rex *v.* Mursley, 1 Term Rep. 694. S. P.

cient,

cient, although the case stated it to be the custom of the country to consider it as an hiring for a year; for such a custom originating since the statute, and therefore long within the time of memory, cannot control an act of parliament. (1)

Neither will it make any difference, that the avowed object for curtailing the time of service is to defeat the settlement.

If with a view to defeat the settlement, it is not fraudulent.

Where the master at the time of hiring told the servant that he should not gain a settlement in the parish, and hired him three days after Michaelmas to serve until the Michaelmas following, the hiring was held not to be within the statute, although the sessions found that such transactions were fraudulent on the master's part (2). For the question of fraud only arises, where in truth there is an hiring for a year, but the parties endeavour to colour it, in order to prevent the pauper's gaining a settlement. (3)

But in favour of settlements, the day of entering upon the service, and that of leaving it, are usually considered as included in the contract; for the law makes no fraction of a day, and the servant is under his master's control during a part of each. Thus an hiring on the day after old Martinmas day *until* the old Martinmas day following is good, and that without resorting to

Days where inclusive.

(1) Rex *v.* Harwood, Cald. 100. South Cerney *v.* Coultshorne; 1 Sess. Cas. 156., where the two mops or meetings were on the Wednesdays preceding and subsequent to Michaelmas-day, and wages were paid for the whole year. See Rex *v.* Standen Massey, post. 321.

(2) Rex *v.* Mursley, 1 Term Rep. 694.

(3) Per Buller, J. Ib.

any

any particular custom in the country to explain the agreement. (1)

Customary hirings.

The only cases of customary hirings which are considered as giving rise to any general distinction, are contracts for service from one moveable feast to the same in the ensuing year. Where such hirings have been interpreted by the practice of the country to mean a year, it seems in one case to be considered as sufficient to give a settlement, although the intervening period of time was less than three hundred and sixty-five days; as where the hiring was from Whitsuntide to Whitsuntide. (2)

I have been able to find but one case expressly deciding the point, but the principle has been acknowledged in others. (3)

In a subsequent decision, however, it has been declared a case of doubtful authority (4): and it has been recently determined that where a statute fair was held yearly on the day after old Michaelmas except when old Michaelmas falls on Saturday, and then the fair is held on the ensuing Monday, a hiring from such Monday until the old Michaelmas following is not an hiring for a year, under which a settlement can be obtained. It is neither an hiring from one moveable feast to another,

(1) Rex *v.* Skiplam, 1 Term Rep. 490. Rex *v.* Syderstone cum Bermer, Cald. 19. Dougl. 441. S. C. Rex *v.* Adson, 5 Term Rep. 28. See also Rex *v.* Navestock, post. (3), where it was stated to be the custom and usage of the country to hire a servant at the statute fair, being the day after old Michaelmas, to serve until Michaelmas following; and that circumstance is relied upon by Lord Mansfield as material to explain the word "till," which may or may not be exclusive according to the subject matter; and the case as explained. Rex *v.* Harwood, Cald. 100. ante, 319. (1).

(2) Rex *v.* Newstead, Burr. S. C. 669.

(3) Rex *v.* Navestock, 2 Bott, 233. Pl. 277. Rex *v.* Harwood, Cald. 100.

(4) Per Lord Kenyon, Rex *v.* Bow, 8 Term Rep. 445., and see Rex *v.* Harwood, ante, (3).

nor from old Michaelmas to old Michaelmas (1). But where a servant was hired from Whitsuntide to Whitsuntide when the interval consisted of more than three hundred and sixty-five days, and was discharged before the ensuing Whitsuntide for being pregnant of an illegitimate child; but after having served three hundred and sixty-five days, the service was held sufficient to confer a settlement. (2)

Must be prospective.

The next circumstance necessary to the validity of the contract, in respect of time, is, that it must be *prospective*. The terms used in the statute express futurity, and no part of the year for which the agreement is made, should be elapsed at the time when it is entered into. It may be for a year to commence at some future time, as a week or fortnight after the hiring (3); and the service need not commence in fact at the time when the servant's year commences, inasmuch as it may be dispensed with by the master. (4)

Retrospective hirings.

But where the agreement is made so that by-gone time is to be calculated as part of the year, and included in computing it, this is called a retrospective hiring, and no settlement can be gained by service under it. Thus where a servant went into a place upon liking, and *after* he had lived there eight weeks, his master hired him for a year, *to commence from the beginning of the said eight weeks*, it is a retrospective hiring. (5)

The law is the same, though the period elapsed, which is to be included in the year, is no more than

(1) Rex *v.* Standon Massey, 10 East, 576.

(2) Rex *v.* Ulverstone, 7 Term Rep. 564.

(3) Rex *v.* Bank Newton, Burr. S. C. 455.

(4) Rex *v.* Islip, 1 Stra. 423.

(5) Rex *v.* Ilam, Burr. S. C. 304. Rex *v.* Hoddesdon, Cald. 23. Rex *v.* Marton, 4 Term Rep. 257. Coombe *v.* Westwoodhey, 1 Str. 143.

a day or two. Where A. was hired to B. six weeks after Michaelmas, to the Michaelmas following; and before his time was out, offered to live with B. for another year from that Michaelmas-day, if he would give him four pounds a year. That proposal not being agreed to, he went away on Michaelmas-day; and three days after the master agreed to give him the money, and he immediately entered on the service: this was held not to be an hiring for a year within the statute. (1)

Conditional hirings.

These sort of hirings, however, are to be carefully distinguished, from such as are called conditional; that is, where the contract is actually made for a year of prospective time, but may be dissolved upon certain terms at the reciprocal election of the parties.

Thus an agreement to live as servant for a quarter of a year, and if the parties liked each other, then she would continue his servant for the remainder of the year (2); to come for a quarter, after the rate of twenty shillings a year, and if the servant and his master liked each other, he was to continue on (3); or to go into service a month upon liking, and have five pounds a year wages, but to go away on a month's wages, or a month's warning, to be at any time paid or given on either side (4); or being hired for a year, at yearly wages, payable quarterly: either party to be at liberty to determine the contract, at any quarter of the year, giving a month's notice (5); are hirings sufficiently good, where the service continues for the year. And it makes no difference that the servant declares at the time of hiring, that the reason why this

(1) Rex *v.* Westwell, 1 Barnard, K. B. 354.

(2) Rex *v.* Lidney, 2 Str. 950.

(3) Rex *v.* St. Ebbs, Burr. S. C. 289.

(4) Rex *v.* New Windsor, Burr. S. C. 19.

(5) Rex *v.* Atherton, Burr. S. C. 203. See also Wandsworth *v.* Putney, 2 Bott, 188. Pl. 240. post. 327. (2)

condition

condition is inserted in the contract is, to avoid a settlement. (1)

In these cases, the hiring was originally conditional; but the condition went only in defeazance of the contract; and the relation of master and servant being continued for a year, the agreement must be taken as if the inoperative condition had never existed.

General hirings.

The distinctions taken hitherto relate to cases where the time of service is specified in the agreement. There are many instances, however, in which no particular period is mentioned for the continuance of service; such cases have been distinguished by the appellation of general hirings. When the contract is thus silent, and nothing appears upon the face of the transaction, from whence its duration can be deduced, the law, in conformity to the several statutes which regulate the service, especially of servants in husbandry, infers that it is made for a year. (2)

Implied hirings.

The principle must of necessity attach upon all cases of implied hirings, strictly so called; that is, where no express agreement appears (3). It is equally applicable to cases where the contract is explicit in other particulars, but silent as to the time of its continuance. A boy was hired to serve in husbandry, and his master agreed to give him meat, drink, washing, lodging, and clothes when wanted; but no particular time was agreed on (4). Another boy went into an inn yard, and asked

(1) Rex *v.* Atherton, ut supra, 322. (5)

(2) 24 Edw. III. c. 1. 4 Hen. IV. c. 14. 23 Hen. VI. c. 13. 5 Eliz. c. 4. "If a man retain a servant generally, without expressing any time, the law shall construe it to be for one year, for that retainer is according to law." Co. Lit. 42. b.

(3) Rex *v.* Lyth, 5 Term Rep. 327. Ante, 307. (3)

(4) Rex *v.* Wineaunton, Burr. S.C. 299.

the master whether he wanted a boot-catcher and driver, and being answered yes, replied he should be glad to serve him, and was ordered to take care of the horses, and not to drive them too hard, and no mention was made of meat, drink, washing, and lodging, but he was found in them, and received no wages (1.) The pauper served the keeper of a public-house in his stable, and his master agreed to find him meat, drink, washing, and lodging in his own house, but was not to give him any other wages but what he might receive as perquisites of the stables, and no particular time was stipulated that he should serve (2). One Jones met a servant girl, then in place with one Smith, and asked her whether she was again hired to Smith; she replying in the negative; he inquired "if "she would come and live with him, and take care of "his child?" to which she consented, and soon after went to him. Two or three days after she came, Jones told her that he would find her in meat, drink, and clothes, and asked her if she would be satisfied with that; she told him she would (3). These have been adjudged hirings by the year; and the opinion of the master and servant as to their being entitled to separate at pleasure, or bound to continue during the year, was held to make no difference in the case. (4)

Hirings for indefinite time.

The rule seems also to extend to cases where the parties use expressions which refer to an indefinite term of service. The pauper having been hired and served for 11 months, his master said to him, "*You may as well stay on an end in your place;* the place suits you and you suit the place." The servant's answer was, "Very well, Sir, I have no objection;" and he continued to follow his

(1) Rex *v.* Stockbridge, Burr, S. C. 759.

(2) Rex *v.* Bath Easton, Burr. S.C. 823.

(3) Rex *v.* Worfield, 5 Term Rep. 506.

(4) Rex *v.* Stockbridge, Burr. S. C. 759. See also Rex *v.* Bath Easton, Burr. S. C. 823. ante, (2)

master's

master's business near three years. The words, *you may as well stay on an end*, in that part of the country, means an indefinite time, and must therefore be considered as a general hiring, which the law construes to be an hiring for a year. (1)

General hiring after one for less than a year.

This inference of a yearly hiring is not rebutted by proof, that it was connected with previous service for a less period. Where the pauper was hired from March till Michaelmas, and continued to serve until her mistress died two or three years afterwards, without a second hiring; it was held that the continuance in the service was sufficient evidence to infer a subsequent hiring for a year. (2)

Though servant quits in the middle of a year.

And this presumption is not affected by the servant's leaving his place in some succeeding year, at a period which does not correspond with its regular close, from the time of entry upon the service; for as it was competent to the parties to put an end to the agreement at any time by mutual consent, the law will rather suppose that they exercised this right, than break in upon its favourite principle. (3)

Special hirings.

Several reported cases do not come properly under the denomination of general hirings, although they bear a strong analogy, inasmuch as they contain no express stipulation respecting time; but they differ insomuch as the

(1) Rex *v.* Macclesfield, 3 Term Rep. 76., and so explained by Lord Ellenborough, C. J. Rex *v.* Tolishunt Knights, 1 Const. Append. 750. Pl. 1071.

(2) Rex *v.* Long Whatton, 5 Term Rep. 447. See also Rex *v.* Hales, 5 Term Rep. 668.

(3) Rex *v.* Worfield, supra, 324. n. (3); where the girl lived with Jones a year and a half, when her mistress told her that her child was old enough not to require attendance, and dismissed her. But in Rex *v.* Pucklechurch, some stress seems to have been laid upon the pauper's quitting the service at the end of the week and in the middle of the year, 5 East, 386.

intended duration of the service is not altogether a conclusion of law, but may be collected from the remaining terms of the agreement; the circumstances attending it; or the conduct of the master and servant during its continuance. As these hirings depend upon special or particular circumstances, they are therefore, as I suppose, denominated special or particular hirings. Whether such an agreement amounts to an hiring for a year, is rather a matter of fact to be collected by the magistrates from the whole transaction, than a question of law. But the court of king's bench, when the facts are stated in a case, will adjudge whether it is a sufficient hiring for a year (1). This conclusion may be inferred, not only from the expressions used, but the manner in which wages are to be paid, the condition of the parties, the nature of the service, its actual duration, and perhaps the general practice of the district in which the hiring takes place, as to the usual period of servitude. These, and many other circumstances, may enable them to ascertain the fact; and where, either from the original inaccuracy of the parties at the time of making the agreement, or their want of recollection when called upon to give it in evidence, they seem to contradict each other, magistrates must endeavour to explore their way as well as they can; yet leaning, as the cases seem to do, towards the legal presumption in favour of a yearly contract, if the conclusion is otherwise doubtful. (2)

Special yearly hirings.

Some cases of this kind afford a more direct inference of an yearly hiring than where it is altogether general, because the terms used, although introduced for another purpose, prove the parties to have meant that the service should continue for a year. Thus where the agreement expressed, that the servant was to have 5l. a year

(1) Per Lord Hardwicke, Rex *v.* New Windsor, Burr. S. C. 19.

(2) See Rex *v.* Overnorton, 15 East, ante, 307. (1)

wages;

wages (1); where the master told a boy coming into his service, that if he staid a year, and behaved well, he would give him a livery and wages the next year (2); these are clear yearly hirings, although nothing else passed about time. The reference to wages for a year in the first case, and to a conditional continuance of service for a year in the second, shews that the parties intended to continue their relation of master and servant for so long.

So where the head keeper of a chace, having parted with one Hill, who had been many years his servant, at yearly wages, and a keeper's livery, &c. asked the pauper, "Do you like the life of a keeper?" and being answered "*yes*;" said, "then go into Ned Hill's place and "you shall want no encouragement; I'll give you a "suit of clothes directly." Here the reference to the terms upon which the former servant had lived with him, manifest an intention to engage the new servant for the same period as Hill had been hired, which was for a year. (3)

There are however a different class of special hirings, in which it is more difficult to ascertain their intended continuance, as they contain facts which contradict and clash with each other. These, so far as they seem referable to any general principles, may be divided into three kinds: 1. where the payment of wages is reserved at stated periods less than a year; as if they are made payable weekly or monthly; 2. where a power exists of terminating the service within the year, but restricted by

Division of special hirings.

(1) Rex *v.* New Windsor, Burr. S. C. 19. The agreement also was, "that she was to go away on a month's wages or a month's warning."

(2) Wandsworth *v.* Putney, 2 Bott, 188. Pl. 240.

(3) Rex *v.* Berwick St. John, Burr. S. C. 502. This hiring would be good as a general one, without any reference, and was so considered by the judges.

a condition of giving previous notice, or, as it is called, warning; 3. where the court have formed their opinion upon the general circumstances of the case.

Apprehension of parties, not evidence; but acts are.

It is to be observed, previous to entering upon these distinctions, that the court have laid it down as a general rule in construing this and all other parts of the contract, that the parties apprehension or understanding of the effect and legal consequence of their agreement, can have no weight in that judicial conclusion which is to be formed respecting its real import. If it were otherwise, paupers would be judges and not witnesses in the cause (1). But any act of theirs done during service, although it originates from their understanding of the agreement, seems admissible as an help to interpretation, where the terms of the contract are not distinctly proved (2); for what is thus done can have no reference to the question of settlement, and is evidence by one party of the engagement under which he was enabled to do it, while acquiescence on the other side, amounts to a virtual acknowledgment of the same fact; and the conversation between master and servant has been received under similar circumstances for the like purpose. (3)

1. Special hirings, with wages reserved periodically.

The general rule as to the effect of reserving wages at short and stated intervals within the year, in ascertaining the duration of the hiring, is, that if there be any thing in the contract to shew that the hiring was intended to be for a year, such a reservation of wages will not controul it; but if the payment of wages weekly or monthly be the only circumstance from which the duration of the

(1) Rex *v.* Wincaunton, 2 Bott, 192. Pl. 241. Rex *v.* Seaton and Beer, Cald. 440. Rex *v.* Birmingham, Dougl. 233. ante, 305. (1). Rex *v.* Elslack, post. 329. There are many other cases to the same effect.

(2) Rex *v.* Dedham, Burr. S. C. 653. Rex *v.* Seaton and Beer, supra, (1) n. (2). Rex *v.* Wintersett, Cald. 298. post. 335. Rex *v.* Pucklechurch, post. 329. (1).

(3) Rex *v.* Seaton and Beer, Cald. 440. Rex *v.* Overnorton, 15 East, 347. ante, 307. (1).

contract

contract is to be collected, it must be taken to be only a hiring by the week (1) or month (2), for the wages becoming due at the end of these periods, the contract out of which they arise must have terminated. (3)

Thus an agreement to live as hostler at an inn, "at "four shillings and sixpence per week," is an hiring only for a week (1). That conclusion has been made more strong in some cases by additional circumstances. As where the hiring was at one shilling and fourpence a week, board and lodging, *for as long a time as the master should want a servant:* the servant was paid her wages at the end of seven weeks, and so on after two or three months, as she wanted money. This is only a weekly hiring, for she could not be discharged at the end of the year if it should happen in the middle of her week (4). An hiring "at so much a week for as long time as the master and servant could agree," is a hiring by the week, for it is a hiring for as long as they could agree from week to week. (5).

The pauper went to live with a livery stable keeper at 9s. per week, without fixing any time for the expiration of such service: some time after, a post-boy going away, the pauper was turned over by his master to take his place at 3s. per week, and the money he could get from those he drove. He served in this employment above a year, when he left his master, but returned afterwards, when his master told him he might go to work, and then re-

(1) Per Buller, J. Rex *v.* Newton Toney, 2 Term Rep. 453. Eod. Jud. Rex. *v.* Hampreston, post, 332. (2) also declared to be a settled rule. Rex *v.* Pucklechurch, 5 East, 302. Rex *v.* Clare, post. 333. (2)

(2) Ibid. Rex *v.* Tolishunt Knights, post. 333.

(3) There is no decision upon a case where the payment of wages refers to stated portions of a year eo nomine, viz. "quarterly or half yearly," or at the "end of a quarter," or "of half a year."

(4) Rex *v.* Elstack or Elslack, Cald. 489.

(5) Rex *v.* Mitcham, 12 East, 351.

mained

mained one year under that agreement. This was held not to amount to an yearly hiring. (1)

The pauper hired himself for eight weeks, at 5s. per week; and at the expiration of that time for three months, at 4s. per week. He then entered into a new agreement with the same master, to live with him, the master finding him board and lodging, and paying him 2s. 6d. per week; but no time was fixed, or talked of, by the master or servant, for the duration of the contract. When the summer season arrived, the pauper said to his master, "I must have more now, I believe, master." The master said, "How much more?" and his wages were increased. And so as the winter or summer succeeded, his wages were accordingly reduced or increased. The alterations of wages took place at the beginning of the week. He entered and left his service on the same day, being Sunday. He served in the whole five years and a quarter, and received money on account of wages; but there was no general settlement of wages till he and his master parted, at which time one took place.

He gained no settlement, for the first and second hiring were for definite periods, short of a year. No time was mentioned at the third hiring, but it was at weekly wages; and this being the only circumstance from which the duration of the contract was to be collected, it must be taken to be only a weekly hiring. Besides, if there were any doubt, a circumstance confirmatory of this construction is, that the servant in the middle of the year required an advance of wages, which the master acceded to without any question (2), and he left his master at the end of the week in the middle of the year. (3)

(1) Rex *v.* Odiham, 2 Term Rep. 622. The case was given up as too clear to admit of argument.

(2) See Rex *v.* Dedham, Burr. S. C. 653. Post. 335.

(3) Rex *v.* Pucklechurch, 5 East, 382.

But

But the rule states that this inference, arising from the payment of weekly wages, may be controuled by other circumstances; in which case, it is considered as introduced to arrange the manner of paying wages, so as to suit the parties' convenience.

Thus where an innkeeper agreed to "give the pauper "one shilling a week, as she had given the other man or "men, and the vails of the stables," nothing was said as to the time of service, and nothing appeared as to the time for which such other man or men were hired, but at the end of the year his mistress said to him, "you have "been here a year, and I will pay you;" to which he answered, "it is no matter, I may stay with you another "year;" and she replied, "very well (1)." The court were of opinion, that it appeared from the conversation of the parties at the expiration of the first year's service, together with the other circumstances of the case, that the original hiring was intended to be for a year; but that at all events the second engagement was clearly a conditional hiring for that period. (2)

2. Special conditional hirings, or with warning.

Where times of warning and paying wages differ.

The second class of special hirings, contains a power of giving warning, or in other words, a condition by which the parties are enabled to put an end to the service at a period short of a year, upon giving stipulated notice. Where the reserved interval between the time of giving warning and that of quitting the service is longer than the time at which the wages are made payable, it is strong enough to controul the conclusion against a yearly hiring, which would otherwise arise from that mode of payment. This has been held not only where it was accompanied with corroborating circumstances, such as an hiring "at "three shillings a week *the year round*, each to be at "*liberty on a fortnight's notice*; but the servant not *to go*

(1) Rex *v.* Seaton and Beer, Cald. 440.

(2) See ante, 330. and the cases post.

"*away*

" *away at seed time, hay, or harvest* (1);" but also where the insertion of the notice was the only circumstance from whence the inference could be drawn. An agreement therefore with a miller " to serve for three shillings and " ninepence a week, or *at the rate* of four shillings a " week;" the parties having a liberty of parting on a month's notice on either side, is an hiring for a year; for the insertion of the liberty to separate on a month's notice shews that the insertion of weekly wages was to ascertain the period at which they were to be paid, and not to limit the duration of the contract; and as the service was to last longer than a week (2), it becomes an hiring unlimited in duration, with the insertion of a condition by which it may be dissolved on either side; which is a general hiring for a year. (3)

When time of warning and of paying wages coincide.

The general rule therefore is, " that wherever the relation of master and servant is to continue for an indefinite time, and cannot be put an end to at the election of either party without notice, the hiring must be understood to be an hiring for a year (4); but where the time of notice corresponds with that at which the wages are rendered payable, the contract is no longer indefinite, but is an hiring for the precise time at which the wages are payable." Thus where the pauper agreed to work for one S. as a blacksmith, at three shillings and sixpence a week, with meat, drink, washing, and lodging at S.'s house, and to part on a week's notice by either party; no notice being given, he served S. for six years, without any alteration in the terms, except that after he had served about four years, the wages were raised from three and sixpence to four shillings per week; this is an hiring by the week. (5)

(1) Rex *v.* Birdbrooke, 4 Term Rep. 245.

(2) Rex *v.* Hampreston, 5 Term Rep. 205.

(3) Ante, 322.

(4) Per Lord Kenyon, Rex *v.* Hampreston, supra, (2)

(5) Rex *v.* Hanbury, 2 East, 423.

The

The pauper let herself to Mrs. H. at six shillings per month, with a month's wages or a month's warning: after a month's service, she removed with Mrs. H. into another parish, who then told her, that if she would *stay on*, as there would be some additional work, *she should have eight shillings per month, and live on with a month's wages or a month's warning as before.* This was held to be a hiring for a month, upon the authority of the former case, not being distinguishable from it. (1)

Warning, coupled with other circumstances.

So also, where a journeyman miller hired himself "*by* "*the month*, at the wages of eight shillings a month, to "be at liberty to depart from his service at a month's "wages or month's warning," with an agreement, that if he continued in the service the harvest time he should be at liberty to let himself for the harvest month to any person he chose: it is an express hiring for a month. (2)

This is a case still more plain than the foregoing, inasmuch as the hiring was expressly for a shorter period than a year (3), and when that occurs, it of necessity excludes the conclusion which might otherwise be drawn in favour of a yearly hiring, when the time of giving notice exceeds in duration that at which wages becomes payable. Thus an agreement to live with one "*by the week*," at two shillings and sixpence a week, "and to part at a "fortnight or month's notice," is not an obligation on

(1) Rex *v.* Tollishunt Knights, 1 Const. App. 750. Pl. 1071. See also the opinion of Dennison, J. Rex *v.* Wrington, Burr. S. C. 281. There the pauper worked in the business of hurling cloths by a weekly hiring or agreement, at the weekly wages of 1*s.* and 6*d.* in the winter, and 2*s.* in the summer. On the Saturday in each week, when the master paid her wages, he said to her, "that she should come the week following."

(2) Rex *v.* Clare, Burr. S. C. 819.

(3) In this case there seems to have been an exception in the contract of the harvest month, see post. 335.

the

the part of the pauper to serve for a year, but an hiring for the stipulated time of a week. (1)

3. Presumption of yearly hiring negatived by other circumstances.

Other circumstances will sometimes prevent the conclusion, that an indefinite hiring is for a year. Such are the nature of the trade, and the relative situation of the parties. Where a boy had worked from six to sixteen with his step father, in his trade of a button-maker, without any compensation besides maintenance and pocket-money; he then left him, having insisted upon a larger allowance, which the father refused. The pauper returning after some time, it was agreed between them, "that he should live in the house, to work as before at "his trade, and to be paid a penny for each gross of "buttons (being the same wages as his step-father paid "other workmen), deducting at the rate of five shillings "a week for his board, washing, and lodging:" this is not a hiring for a year, but of a workman to work by the piece (1). So where a plumber and glazier let himself at the wages of six shillings a week, board, lodging, and washing, summer and winter; and after serving eleven months, his master having taken an apprentice, told him he must lodge out of the house, upon which he demanded sixpence a week more, threatening otherwise to quit the service, on account of his master's having withdrawn from the original agreement, and was paid it. This was determined not to be a yearly hiring; for the stipulation of six shillings a week wages, summer and winter, only imports an agreement, that the wages should continue always the same; and the presumption of a reciprocal obligation between the contracting *parties*, which is necessary to constitute a general hiring, is destroyed by a

(1) Rex *v.* Bradnich, Burr. S. C. 662.

(2) Rex *v.* St. Peter's Dorchester, Burr. S. C. 513. See also Rex *v.* Wrington, Burr, S. C. 280.

demand

demand of an increase of wages, and the master's compliance in consequence of a threat on the part of the servant, that he would otherwise quit the service. (3).

So where a boy being hired a few days before Martinmas, to serve from Martinmas for a year, fell ill the very night of the hiring, and did not go into service for a month afterwards; when he and his mother went into the master's house, who being from home, they were shewn to his wife, who complained that the pauper had not come into the service according to the agreement, and therefore refused to receive him; whereupon the pauper's mother said, "we must fall into your way for wages, and take "what you will allow us;" and left the pauper in his service, where he continued until Martinmas following, when the mother was sent for, and received for forty-eight weeks wages, after the rate of one shilling and twopence per week, being less than the rate of the original wages. This was held to be a dissolution of the original hiring, and the making of a new agreement; and the court was also of opinion, that the parting at the end of the original year, and receiving wages for forty-eight weeks, proved that the second hiring was not for a year. (2)

Exceptive hirings.

The fourth circumstance necessary to render the contract of hiring sufficient for the purpose of gaining a settlement is, that it contains no special exception to exempt the servant from the controul and authority of his master, at specified periods. These may be denominated exceptive hirings: this rule depends upon the principle already discussed, that the agreement should be for a complete year's service. If particular times of the year are excepted, and the servant is left to his own disposal,

(1) Rex v. Dedham, Burr. S. C. 53.

(2) Rex v. Wintersett, Cald. 291.

so

so that the master cannot exercise any degree of authority over him, the service is just as much short of a year, by the sum total of these exceptions, as if the time contracted for had been less by an equal portion of connected time: the only difference is, that one is so much less by a space intersected with intervals of service, and the other by one equal in extent, but occurring altogether. (1)

Exceptions by contract of periods the law would except.

Whether these reservations are made of particular seasons, or days, or even hours of the day, the servant gains no settlement by service under a contract infected with this exception. Neither does it make any distinction, that periods are excepted, which the law would except, without reservation, so as not only to excuse the servant from labour, but to punish him if he worked during the time. A servant is not compellable, when hired in a particular trade, to work at unseasonable hours of the night, and he is punishable if he profanes the sabbath-day; but an express exception in the hiring, even of these seasons, will defeat a settlement; for the right of compelling the servant to work, is not the sole power which the master possesses over him. In exacting labour from his servant, he is subject to the general law of the land, or possibly to the particular custom of the place in which the service is performed (2); but with this exception, a right of controul and authority, at least so far as relates to the general discipline and government of the servant, must reside in the master at all times during the continuance of the service. (3)

(1) It seems as if the exception must be made on behalf of the servant, the master having, at all times, legal power of dispensing with the service of his servant, and the cases are all of this kind. See the opinion of Ashhurst, J. Rex *v.* Sulgrave, 2 Term Rep. 376. post.

(2) See Rex *v.* Birmingham, Dougl. 333. Per Lord Ellenborough, C. J. Rex *v.* Horwick, 10 East, 490.

(3) Per Foster, J. Rex *v.* Wrington, Burr, S. C. 280.

Thus

Thus an hiring of a bastard eight years old, with his mother's consent, to work in a silk mill for three years, at weekly wages, without diet or lodging; the service to be only eleven hours in the six working days, and all the rest of the time, as well as on Sundays, the servant to be at his own liberty, and his own master (1); an hiring of a minor, by agreement in writing, with a clothier for five years, to be taught the business of a sheerman, "to receive weekly wages, and work sheerman's hours, and "to be at his own liberty at all other times (2);" or, "for five years, at weekly wages, as a colt sheerman, "to work twelve hours each day (3);" are exceptions in the contract, which prevent the parties from standing in the relation of master and servant, but on certain days and for particular hours of the day; wherefore the servant gains no settlement.

Exceptions of particular hours in the day.

So where a servant agreed by covenant to work and serve as an artificer, in the art of a glass-grinder, or any other art his master should think proper to employ him in for seven years; and that he would not work for any other person, but "would continue and be in the service "from six o'clock in the morning till seven in the even-"ing of each day, during the said term, including half "an hour at breakfast, and one hour at dinner times, "except on Sundays, if in proper health." This is a covenant to serve only thirteen hours on working days, and to be his own master on Sundays; for the expression of so many hours is the exclusion of the rest, and therefore no settlement can be gained by service under it (4). And it was thought to make no difference, "that the "servant occasionally worked in the night-time, and "often went on errands for his master on Sundays;" for where the contract is explicit, it is not how much the

Exception where servant has worked during excepted hours.

(1) Rex v. Macclesfield, Burr. S. C. 458.

(2) Rex v. Buckland Denham, Burr. S. C. 694.

(3) Rex v. North Nibley, 5 Term Rep. 21.

(4) Rex v. Kingswinford, 4 Term Rep. 219.

servant actually does, but what he has agreed to do, that is to be considered. (1)

An agreement to deduct wages, no exception.

But where there is no express exception of time in the contract, a mere agreement to deduct wages for a possible loss of time does not vitiate the hiring; for it is rather settling a rate of wages, and leaving the extent of service in the master's discretion, than an exemption of the servant from his master's authority, and is like the cases where the payment was to be for spinning by the stone (2); or "for screws by the gross, good earn good hire (3)." Thus where one clubbed or agreed to serve another for three years at weekly wages, to learn the trade of a bricklayer, and do any other work his master was to set him about, "and if prevented at any time from working by "badness of weather, illness, or from his master's not "having employment for him, a proportionable deduc-"tion was to be made from his week's wages for such "loss of time;" it is a good hiring, and a year's service under it will gain a settlement, though occasional deductions were made on these accounts (4). In this case the possible exemption from employment was not left to the servant's option, but was made to depend on circumstances over which he had no controul.

Exceptions of days at particular seasons.

If the exception of part of the day vitiates the contract, an exception of a particular season or number of days must do it more decisively. Thus an hiring from Michaelmas to Michaelmas, "with liberty to let himself for the "harvest months to any other person (5);" or from one Harborough fair to another, being a year, "subject to a "liberty of being absent eleven or twelve days in the "sheep-shearing season, and to have the benefit of what

(1) Rex *v.* Kingswinford, 4 Term Rep. 219.

(2) Rex *v.* King's Norton, Burr. S. C. 152.

(3) Rex *v.* Birmingham, Dougl. 333.

(4) Rex *v.* Martham, 1 East, 239.

(5) Rex *v.* Bishop's Hatfield, Burr. S. C. 439.

"he

'he got during that time (1);" or an exception of two days in each half year, (the servant being a pensioner in the East India company,) to go and receive his pension (2); are not sufficient hirings, not being for a year, but for a period short of it by the time excepted in the agreement. As is also a contract of hiring for four years, with liberty for the servant to leave for a week every year to see his friends; for the master had no dominion over the servant for any one entire year. (3)

Service in the militia.

Two cases have however been adjudged, in which it has been held, that an exception in the contract does not render it so defective as to prevent a settlement. A pauper was hired for a year, but at the time of hiring told his mistress, " that he was in the militia, and *he might be* " about a month in the year to attend in that duty, *and* " *he would pay a man to serve in his place, or else would* " *make her an allowance out of his wages for the time he* " *was absent* (4)." Also where a man being hired for a year, his wages to be paid weekly, told his master that " being a balloted man in the militia, he should be ab- " sent for the month, *and in lieu of that month, should* " *serve another at the end of the year* (5)." These hirings were held good, and the following distinctions made between them, and the preceding cases, as I have collected them from the report. 1. This is not a chasm in the contract, but a dispensation with the personal service. 2. It was not an absolute exception of a month; there was an alternative, as it might happen that the servant should not be called out. 3. The agreement as to the absence for a month in the militia, was only what would have been implied, and what the master must have consented to; as the law would have compelled the absence, and the exception was not of time, which it was in

(1) Rex *v.* Empingham, Burr. S. C. 791.
(2) Rex *v.* Over, 1 East, 599.
(3) Rex *v.* Rusholme, 10 East, 325.
(4) Rex *v.* Westerleigh, Burr. S. C. 753.
(5) Rex *v.* Winchcombe, Dougl. 391.

the option of either to dispense with (1). 4. The court ought to lean in favour of settlements, and the bad consequences would be very extensive, if they were to determine that a man should lose his settlement by serving his country in the militia.

Liberty of absence, employing a fit person, &c.

On the other hand a pauper was hired for a year as a shepherd, to receive weekly wages, with liberty to be absent during the sheep-shearing season, but to find a fit man at his own expence, to do his work during absence, his own wages to go on during that time. He continued his year, but was absent during the sheep-shearing season, when he employed a person to attend the flock, and occasionally returned, giving directions to the person he employed, and assisting in managing it, especially on Sundays. He gained no settlement. For there was an exception in the original contract, and he was not to be under his master's control and command for the whole year. It was no part of his engagement that he should come backward and forward during the sheep-shearing season. (2)

Distinction between exceptions and omissions.

But a distinction is to be carefully observed between actual exceptions from service in the original contract and the servant's omitting to work during the continuance of his agreement. Whether this be in consequence of a general lawful exemption from labour, such as on days set apart for sacred purposes; or by the usage of particular districts; or by his master's previous permission; or even by the neglect or disobedience of the servant, it will not prevent a settlement, provided it be subsequently forgiven by the master. These are cases not of exemptions in the contract, but of dispensations with service, and will be more fully considered under the next requisite for gaining a settlement, namely, the year's service. (3)

(1) See the opinion of Lord Kenyon, 53 Geo. III. Maule & Selw. MSS. and C. J. Rex *v.* Over, ante, 339. (4). post. 350.

(2) Rex *v.* Arlington, Trin. (3) Post. 348, &c.

The pauper was hired as a bleacher and crofter for a year, at 12s. a week. He worked under it for a year. In these works each bleacher is to get up a certain number of pieces in the week, the task being calculated at so many pieces a day for six days, and if he finishes in less time the remainder is his own. The pauper did so, and went when he pleased on Sunday without asking his master's leave. He gained a settlement, for there is an express hiring for a year and no express exception of any part of it. An exception cannot be implied from the custom of the country, and much less from that of a particular house of manufacture. (1)

SECT. IV. — PART I.

Of the Year's Service.

HAVING treated of the contract of hiring for a year, we are to consider next, what amounts to a performance, and constitutes the year's service within 8 & 9 W. III. c. 30. which declares, that no servant shall gain a settlement in any parish or township, "unless he shall *continue and abide* in the *same* service for the space of *one whole* year." 8 & 9 W. III. c. 30.

Service, therefore, which is but a day or two short of a year, does not satisfy the statute, nor confer a settlement (2). But service for a year, consisting of 365 days, is sufficient, although the agreement be for a longer period. A servant maid was hired from the moveable feast of *Whitsuntide* to the *Whitsuntide* following. Having served more than 365 days, she was discharged for being pregnant of a bastard child, a few days before the coming of that following *Whitsuntide* to which she had agreed to serve. This was adjudged to be a service for a year, within the statute. (3) Service for 365 days.

(1) Rex *v* Horwick, 10 East, 489.
(2) Per Lord Kenyon, C. J. Rex *v.* Grantham, 3 Term Rep. 754. See also Rex *v.* Whittlebury, 6 Term Rep. 464.
(3) Rex *v.* Ulverstone, 7 Term Rep. 564.

Service: 1. Actual. 2. Constructive.

The performance of service may be either *actual*, or *constructive*. Where the servant continues personally to fulfil the duties of his station towards his master in the terms of his contract, without intermission, it is *actual* service. Where he does not perform these duties, but they are dispensed with, the service is *constructive*.

Origin of dispensations with consent.

It has been already seen, that the law invests the master with authority to enforce performance of the servant's contract; but having gone thus far, it leaves him to exact or remit the service as suits his convenience or discretion. He may compel his servant to work at all lawful seasons, or suffer him to remain unemployed. If he should prove remiss and negligent, the master may punish remissness, and enforce attention; but this idleness, whether permitted or otherwise, has no effect on the settlement, whilst he continues in the service, that being all which the statute requires.

Idleness.

An omission of actual service is not confined to time, when the servant actually resides with his master; he may be occasionally absent altogether, neither employed in his business, nor ready to be so if called upon. Here the power of the master is not less (where exercised without fraud) to dispense with personal attendance, and forgive temporary absence, than it is to endure idleness or overlook negligence while the servant resides on his farm, or lives in his house. The necessity of leaving somewhat of discretionary indulgence to the head of the family, and the impossibility of placing any bounds to it short of fraud, require that this should be considered as constructive service, sufficient to satisfy the statute.

Dispensations in law.

The servant may be likewise absent for an excuseable cause, to which the master's consent is not required; such are illness, the master's inability or refusal to let him serve the remainder of the year. In such cases, the law does not require the master's consent, but looks upon the service as constructively performed for the purpose of a settlement,

tlement, provided the servant does not agree to dissolve the contract.

Dispensations from service are therefore of two kinds; 1. Such as arise out of the master's consent; 2. Such as are created by operation of law.

Dispensations with consent: 1. Express. 2. Implied.

Dispensations with the master's consent, are also of two kinds; 1. Express, where his leave is asked and obtained; 2. Implied, or constructive, when, though not given in terms, it is to be inferred from the circumstances of the case.

But this power of assent exists only during the contract's continuance: if that is dissolved, and the servant absents himself, the power to dispense is gone; for the contract being at an end, the master has no right to command attendance, and consequently no authority to dispense with it. The servant does not continue in service for *a whole year*, but a chasm is created, which no return nor subsequent act of the parties can cure.

Dissolutions: 1. By consent. 2. Order of magistrate.

A dissolution of the contract takes place two ways, 1. By mutual consent of master and servant; 2. At the desire of one of them, through the intervention of a magistrate, for some lawful cause.

1. Dissolution by consent.

Dissolutions by mutual consent, like dispensations, may be either express or implied. In many cases where the master has consented in terms to the absence, it is difficult to determine whether the contract is intended to be continued, or put an end to. Recourse must be had therefore to the various circumstances which attend the servant's departure, or return, in order to explain these equivocal expressions, in the same manner, as where the parties are entirely silent, and all is left to inference and conjecture.

As a settlement is always gained where the service is dispensed with, and never where it is interrupted by absence under a dissolution of the agreement, it is usual to consider questions of constructive service as depending upon the fact of whether there has been a *dispensation of the service*, or an *absolute dissolution of the contract*. If this distinction be put as embracing all points that can affect the question of a year's service, it seems inaccurate. There may be an absence which cannot be purged so as to permit the time to count in the year's service, although no dissolution of the contract has taken place; and there may be a dissolution, which works no discontinuance of the service. (1)

Where the master's consent is necessary, and not expressly given, it may be inferred from circumstances; but the facts of a case may sometimes not only furnish no ground for that inference, but may lead to a contrary conclusion, notwithstanding a continuance of the contract.

Three kinds of absence.

Absence from service therefore may, with reference to settlements, be distinguished into three kinds: 1. Under a dispensation; 2. Under a dissolution; 3. Where the contract continues, but the master's consent cannot be implied. In the first case a settlement is acquired; in the two last it is defeated.

Whether absence is under a dispensation with service, or a dissolution of the contract, is a fact depending upon the circumstances of each particular case as they appear in evidence (2). It is a conclusion to be drawn therefore by the justices (3); but the court of king's bench will lend

(1) See post. sect. iv. part 2. of this chapter.

(2) Per Le Blanc, J. Rex *v.* Mildenhall, 12 East, 466.

(3) Rex *v.* St. Peter Mancroft, 8 Term Rep. 477. Rex *v.* Hardhorn, 12 East, 51. Rex *v.* Mildenhall, ante, n. (2); post. 345.

its

its assistance to the magistrates to correct or confirm their opinion. (1)

The criterion to distinguish between the two cases is now settled to be, whether the servant continues liable to serve for the whole year, though the master dispenses with the actual service for part of it. If he does, the servant gains a settlement, because the relation of master and servant subsists all the year, and the master may resume his right to the service whenever he chuses; but if the master has once parted with his control over the servant, so that neither he nor the servant retain a power of compelling subsequent performance of the contract, it is dissolved, and no settlement is gained (2). This distinction does not seem to comprehend some of the more ancient cases, particularly where the consent was expressly given (3). But in all recent decisions, the court have abided by this rule, with the fixed purpose of laying down a certain principle for determining all future cases in which, either through consent of parties or other circumstances, the contract is to be considered as put an end to before its regular termination by efflux of time. (4)

Principle of distinction between dispensation and dissolution.

No distinction arises from absence taking place at the beginning, in the middle, or at the end of the year (5). There may be a constructive service, or a dissolution of

Absence in the beginning of the year, &c.

(1) Per Lord Kenyon, C. J. Rex *v.* Whittlebury, 6 Term Rep. 464. Per Lord Ellenborough, C. J. Rex *v.* Corsham, 2 East, 303. There are several other cases to the like effect. But in Rex *v.* St. Mary Lambeth, Lord Kenyon, C. J. expressed a wish that the sessions would in future find the fact whether or not the parties put an end to the contract before the expiration of the year, 8 Term Rep. 236. and in Rex *v.* St. Peter's Mancroft, ante, 344. (3), the case was sent down to be restated.

(2) Per Lord Kenyon, C. J. Rex *v.* Thistleton, 6 Term Rep. 185. Rex *v.* St. Peter Mancroft, 8 Term Rep. 477. Rex *v.* Maidstone, 12 East, 550.

(3) See post. 347. et seq.

(4) Rex *v.* Rushall, 7 East, 471. Rex *v.* Tollishunt Knights, ante, 333. (1), and several other cases, post.

(5) Per Lord Kenyon, C. J. Rex *v.* East Shefford, 4 Term Rep. 801. Per Lord Mansfield, Rex *v.* Wintersett, Cald. 397. And see the several cases, post.

the

the contract, in each of these cases, according to the difference of circumstance in other respects.

1. Of dispensations. 1. Express leave.

Where the leave of absence is expressly given before the service begins, the only questions that can arise are; whether the parties intended that the contract of hiring should commence previous to the actual commencement of the service; or if the agreement does in fact comprehend the period of cessation from service, whether this time of absence which the servant is allowed does not amount to an exception in the contract. If the leave be given afterwards, the point is to distinguish it from a dissolution.

Hiring from Michaelmas to go into service the Wednesday after.

The first is sometimes (although very seldom) clear from the terms used by the parties. As where the pauper was hired on the Friday before Michaelmas-day, from Michaelmas old style, for a year to a farmer, to be his carter, and had one shilling earnest, and was to have six pounds wages, and to go into his master's service the Wednesday after Michaelmas-day old style. Per Lord Mansfield: It is expressly stated, that on Friday before Michaelmas-day the pauper was hired for a year from Michaelmas; it is there expressly stated, that they stood in the relation of master and servant from Michaelmas to Michaelmas; if so, it would be repugnant to say, that this was not an hiring for a year. The case itself contradicts the idea that it was an hiring from Wednesday after Michaelmas. Then the absence was matter of indulgence on the part of the master, and whether revocable or not, is so common in these transactions, and so reasonable upon the commencement of a service, that it has never been considered as impeaching or affecting the validity of a contract. But under all the circumstances of this case, I consider it as an indulgence, which the master might revoke. (1)

(1) Rex *v.* Grendon Underwood, Cald. 359.

As

As the language in which parties express their meaning is usually obscure and diversified, recourse must be had to the different circumstances of each case to interpret their contract. There is no particular class of cases which depends upon any set form of expression.

The various decisions, therefore, upon this very perplexed head of settlement law, may be better arranged by a reference to other circumstances which admit of a more natural analogy (1); but it must be observed, that the language of the parties does of necessity constitute the leading means to ascertain the effect of every agreement.

Consent implied by return to service.

The most simple cases of implied consent are where nothing appears but the absence and return of the servant; for although the absence is without leave, it is cured by the servant's coming back, and the master's receiving him into his service, unless it appears that the contract has been actually dissolved.

Absence in the beginning.

Thus where a servant was hired from Michaelmas to Michaelmas, he came three days after the first Michaelmas, and stayed one day after the latter, and was absent at different times near a fortnight, for which an abatement was made in his wages; it was held that he gained a settlement by serving the remainder of the year, for the absence was purged by the master's receiving him. (2)

(1) The judges have often declared that it is difficult to discover the principle of decision in several cases upon this subject; and the writer is compelled to confess, that his own incapacity for the task he has undertaken, never strikes him so forcibly, as when he considers his utter inability to arrange these decisions into a connected system by the means of leading principles.

(2) Rex *v.* Hanbury, Burr. S. C. 322. See also Rex *v.* Maddington, Burr. S. C. 675.

So

In the middle.

So where the servant went during his year, without leave, to see his mother, and stayed away four days, and then returned into the service; it was adjudged that the master dispensed with the attendance by taking him again. (1)

Neither does it make any difference that the absence is partly with the master's leave, and partly without. As where a master having little to do, agreed with his servant that he might have leave of absence for six weeks to work for himself, wherever he pleased, allowing fifteen shillings out of his yearly wages; he was absent seven weeks, being a week more than he had leave for, and then returned, and was received: this absence did not prevent his settlement. (2)

Absence in beginning.

Where the absence has been at the commencement of the year, the court seem rather to have leaned towards construing the conversation between the parties into a leave of absence, than an exception in the contract.

Hiring from Saturday. Master desired pauper to go into service before Monday, &c.

As where on Thursday before Michaelmas-day, which happened on Saturday, the pauper agreed with a farmer, as carter, to go into his service on the Monday following, until the ensuing Michaelmas, for six guineas. At the time of the agreement, his master desired him to go into his service before Monday: but the servant said it would not suit him, as he was then in service; and the master replied, if he would come on the Monday morning, he would shift till that time. The service in which the pauper was at the time of making this agreement expired on

(1) Rex *v.* Islip, 1 Str. 423. In Rex *v.* Eaton, Burr. S.C. 47. The servant was absent three weeks in the middle of the year, without consent, and held to be purged by the master's taking him again.

(2) Rex *v.* Undermilbeck, 5 Term Rep. 387.

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the ensuing Saturday, being Michaelmas-day; he left it on that night, and went into his new master's service on the Monday following, as agreed upon. He served till the day before the ensuing Michaelmas, when he desired leave to go and see his relations, before he went into another service: his master deducted one shilling from his wages for that day, and paid him the residue. The master, on his going away, told him, that if he went before Michaelmas-day, there might be a dispute about his settlement, and desired him to come back; but he went away and returned no more.

Two questions arose upon this case. First, whether this was a good hiring for a year? Secondly, whether there was a sufficient service, the servant being absent the first and last day? The court were of opinion, upon the first point, that the sessions ought to draw the conclusion that this was an hiring for a year, "else why should the "master desire him to go into his service before Monday, "or say that he would shift till that time?" It appears from this, that the master understood it to be an hiring for a year; and likewise from his desiring the pauper to come back, lest his settlement should be disputed if he quitted the service before Michaelmas-day. They were also of opinion upon the second, that there was a year's service, the servant having had leave of absence for the first and last day. (1)

Absence first and last day.

Neither will the length of absence prevent the settlement; the law is the same, whether it be for three days, or so many months.

Length of absence immaterial.

A servant hired for a year ran away after serving eight weeks; he was absent for thirteen weeks, working with and receiving wages from another person, when his mas-

Absence 13 weeks.

(1) Rex *v.* Bray, Burr. S.C. 682.

ter

ter apprehended him *by a warrant*, but in his way to a justice, asked whether he would *come back* to his place, or go to a prison? and if he would come back *and go on* in his place as he ought to do, he might. He said he would come back; and his master asked him then, what he would be willing to abate for the time he had been absent? He said he thought a shilling a week would not hurt him, which was agreed to. He served the remainder of the year, and received all his wages but the thirteen shillings agreed to be deducted. The court were of opinion, that the length of the absence was immaterial; as was also the period of the service at which it took place. The only question was, whether the pauper's service was performed under the old, or under a new contract; but there was no pretence to say he entered into a new contract, the master's object in apprehending him by a warrant being to compel him to complete his service under the old. (1)

Absence last day of year.

But where absence continues during the last days of the year, the master's permission cannot be implied from a subsequent return to the service; it is more difficult therefore to determine in these cases, how far the absence is by reason of a dispensation, or after a dissolution of the relation which existed between them.

Absence, putting another in his place.

In the first decisions in favour of dispensations at the end of the service, it was evident that the relation of master and servant was not determined by the absence. Where the servant asks leave to go, and puts another in his place to perform those duties, which he must otherwise have done, and the master assents upon that condition, they acknowledge the continuance of their contract, by the terms under which they dispense with its personal execution. (2)

(1) Rex *v.* East Shefford, 4 Term Rep. 804. See also Rex *v.* Grantham; an absence of 13 weeks, with the master's consent, 3 Term Rep. 754.

(2) But see the distinction where it is made an exception in the original agreement, Rex *v.* Arlington, ante, 340.

Thus a servant hired for a year, served until within three weeks of the end of it, when he asked his master's leave to go to the herring fishery; the master consented, if he could get a man in his place to do his work to the master's liking. The servant procured such a substitute, whom he agreed with and paid; he received part of his wages when going, and the remainder for the whole year on his return, which was three weeks after the expiration of his year. It was held that there was no dissolution of the contract, but a constructive service under it. (1)

Absence, making compensation.

So if the servant works with another, with his master's consent, *to whom he makes a compensation, and is bound to return when called upon*, it is in fact nothing more than leave given by the original master to work with some one else, and is substantially service done with the former. As where a servant, five weeks before the expiration of the year, went with his mistress's leave to work with one L. in a different parish, and received his year's wages after the expiration of the year, when he voluntarily deducted the amount of the money he had earned during his absence; and it was further found, that if his mistress had required him to return during the five weeks, he would have done so. The contract subsisted, and the service was dispensed with; for the servant paid the mistress, or what is the same thing, voluntarily deducted from the wages his mistress owed him, *what he had earned* during his absence, and would have returned during the five weeks, if she had required it. This therefore was service done for her, since if the contract had been dissolved, the servant would not have returned, and the sum deducted should not have been the amount of his earning, but a part of his year's wages proportioned to the time of his absence. (2)

(1) Rex *v.* Goodneston, Burr. S. C. 251.

(2) Rex *v.* Nether Heyford, Burr. S. C. 479.

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It seems also to make no difference, that the pauper is not bound to return within the period of absence, provided the parties clearly acknowledge the continuance of the contract, by giving a licence to depart, and receiving a recompence for that time. The pauper was hired to Ann Tyler to serve for a year, at which time he told her, that he was in the militia, and *might be absent* about a month in the year to attend in that duty; and at the same time he told her, that he would pay a man to serve in his place, or else would make her an allowance in his wages for the time he was absent. Having served till May, he then joined the militia for thirty days, and afterwards returned to his service, and continued until the end of the year, and then made his mistress an abatement of eight shillings of his wages, for the time he was absent. The court were of opinion, that the year's service was completed. "In the present case the man is hired for a year, to serve for a year, but mentions an event that might happen, of his being called out to attend his militia duty; and told his mistress that if it should so happen, he would either pay a man to serve in his place, or make an allowance out of his wages." This is not a chasm in the contract, but a dispensation with the personal service. It was at the election of the mistress, either to dispense with his attendance, and have a substitute, or to have an abatement out of his wages, and she preferred the latter. (1)

So where a yearly servant served the last half year with the assignee of his master's stock and farm, there being no conversation about dissolving the contract with the old, and no fresh contract with the new master (2): and where a servant, with his master's consent, worked with different masters, receiving their wages, and making an allowance to his original master out of the wages payable by him, in the same proportion as the time of his absence bore to

(1) Rex *v.* Westerleigh, Burr. S. C. 753. ante, 339.

(2) Rex *v.* Ivinghoe, 1 Str. 10.

his

his entire year (1). These absences were held to be dispensed with, and the service virtually performed to the first master. (2)

When master's consent appears, and nothing more. Post.

And where the master's consent appears to have been asked, and given, and nothing more, it is to be intended that the absence is in consequence of a dispensation, and not of a dissolution. As where a yearly servant, three days before the expiration of his year, went to his father's, with his master's consent, and whilst he continued there, his year's service expired; after which he went to receive his wages, when his master deducted for a former absence, but not for the latter. It was deemed a good constructive service. (3).

Leave of absence for a fortnight at the end of a year to get what he can.

So also a dispensation has been inferred from circumstances, although the master seemed to have parted with his power of controul for the remainder of the year. (4)

As where the pauper was hired in February till the old Michaelmas following, and served accordingly. On the Friday before old Michaelmas, his master asked him if he would stay again; the pauper said he would, if they could agree about wages, and asked five guineas, which the master thought too much. The pauper immediately set out to go to a statute, and having gone about ten yards, returned for something he had forgotten. He then met his master, who said he would give him five guineas, and gave him one shilling earnest. The master, while he was putting his hand in his pocket for the shilling, said, "You shall go away a fortnight at *Michaelmas*, because of "your settlement; I will give you that fortnight to get "what you can:" to which the pauper then agreed. The pauper accordingly went and stayed a fortnight at his

(1) Rex *v.* Beccles, Burr. S. C. 230.

(2) Rex *v.* Undermilbeck, 5 Term Rep. 387.

(3) Rex *v.* Undermilbeck, 5 Term Rep. 387. See post. sect. v.

(4) But see ante, 345.

father's, during which time he worked for another person, digging sand at one shilling per day. At the end of the fortnight he returned to his master, and continued to serve him till Lady-day, and until his master died, soon after; he then received his wages from a relation of his mistress, and believes that nothing was deducted for the fortnight; but he does not remember what sum he received. The pauper apprehended that his master would not have hired him, if he had not agreed to go away for the fortnight. Ashhurst J. " The rule established in these kind of cases is this: when there is a *bonâ fide* exception of part of the time, at the time of the hiring, that is not an hiring for a year; but if there be no exception, at the time of making the original contract, then a permissive absence is considered as a dispensation of part of the service by the master; and it does not operate in the same way as an exemption out of the original contract, which defeats the settlement. And the question whether it be one or the other must depend on the particular circumstances of each case. In this case there was a complete hiring for a year at the time. The parties having disagreed on the terms proposed, the pauper went away; but on his return, his master said he would give him the five guineas, which he agreed to accept, and gave him one shilling earnest. It is likewise stated, that while the master was putting his hand into his pocket, he told the pauper he should go away for a fortnight; but the contract was complete before that time, and what passed afterwards can only be considered as a dispensation with the service; for at that time the master had a complete right to his service for a year, and the pauper had agreed to serve him for that time, and the one shilling earnest was to bind the agreement for a year for the five guineas; otherwise it appears to be giving the servant more than he originally asked for the whole year, for serving him for a shorter period. If then the contract were complete before any thing was said relative to the fortnight's ab-

sence, this was a dispensation with the service, and not an exception out of the original contract. An exception is a stipulation on the part of the person for whose benefit it is introduced; but here it was not made on the request of the servant, but on the offer of the master; and it appears that he said it was for the express purpose of preventing the pauper's gaining a settlement. That is not such a reason as the court would give much countenance to; whether indeed the sessions might not have determined this on the ground of fraud, was for their consideration; as it is, there is no occasion to go into that ground, as we are of opinion that this was a dispensation with the service: with respect to the servant's apprehension, which is stated in the case, that cannot vary the question; we are to decide on the terms of the contract, and not on the apprehension of the pauper."—Buller and Grose J. same opinion. (1)

Absence on the master's account and request. Post.

The next class of cases, in which the court has inclined to infer a dispensation, is where the absence takes place solely on the master's account, and at his request. Here it originates with him in whom the power of dispensation is vested, and is only acquiesced in by the servant; the contract is therefore supposed to continue notwithstanding absence, unless it appears by other circumstances to have been dissolved by the express consent of both parties.

A footman, whose year would expire the thirtieth of October, married a fellow-servant on the fourth of September preceding; she had previously given a month's warning to quit, and was to have left her place in September, but was desired by her master to stay till the seventeenth of October, which she did; when the master said to the husband, he supposed as his wife was going away, he would like to do so too. The husband replied, he would like it better, if it was agreeable to his master.

(1) Rex *v.* Sulgrave, 2 Term Rep. 376.; and see Rex *v.* Mildenhall, 12 East, 482. post.

His master said he had no objection, as he had another footman coming, and would pay him his whole year's wages, which he accordingly did on the 17th, in full to the thirtieth. The husband and wife left the service on the seventeenth, and the new footman came on the same night into his place. It was held that this was a dispensation with the service from the seventeenth to the thirtieth; the master voluntarily giving him leave of absence for the last thirteen days, and of his own accord offering and paying him the whole year's wages, is proof of his consent. (1)

The pauper being hired for a year, her master, who when she was hired, lived in London, purchased a manufactory in Manchester two months before the expiration of her year. He then told all his servants that he was going to reside at Manchester, but did not mention any time, and that they *might look out for other services if they chose, or might stay with him till he went.* The pauper did not look out for any other service, but continued with her master until within seven days of the expiration of her year; on the evening of which day, her master *paid her the whole year's wages, and gave her half a guinea over*, and went to Manchester the same evening. He did not know that morning that he should go in the evening, or before the expiration of the year's service; it depended upon circumstances, which he could not at that time foresee; but if he had remained, he would have continued the pauper in his service, and she went into a new one two days after her master left London. Lord Mansfield C. J. "The only question is, whether the servant continued *bonâ fide* in her service during the whole year. There is a distinction between exceptions from the contract and dispensations of the service; but if the case be of the latter description, and *bonâ fide*, it can make no

(1) Rex v. Richmond, Burr. S. C. 740.

difference

difference when the servant is engaged, or where, or whether the service be in the same, or in another occupation. Why then does she quit the service: *at the desire and for the convenience of her master, who gave her half a guinea beyond her wages, as an equivalent no doubt for her board: it was accidental, and a favour to the master.* The case of Rex *v.* Richmond (1) is full as strong as this, for there a new servant came into the very place which the pauper had vacated upon a dispensation of his service. Fraud vitiates every thing, but the justice and reason of the thing are here with the settlement. Suppose she had come from a distant country, and had no other settlement, shall she lose her only one, which she deserves so well?" (2)

These seem to be the two strongest cases on the subject; and in the first it was not considered as making any distinction, that the master hired another servant in the footman's place; nor in the second, that the servant hired himself into a new place, two days before the expiration of the year. In this last, the servant had put it out of her power to return to the service of her original master, if he should have required it of her, by entering into a relation incompatible with it; so that it seems to resemble the cases already mentioned, where the servant worked with another master, with consent of the first. (3)

The next class of cases of constructive service, are such as arise by operation or inference of law. Here absence

Service by operation of law.

(1) Ante, 356. n. (1).

(2) Rex *v.* St. Bartholomew, Cornhill, Cald. 48.

(3) It seems, however, from the current of recent decisions, that these determinations, and possibly some others (if not absolutely over-ruled), are at least to be regarded only as authorities in cases which precisely correspond with them in circumstances. See the opinion of Lord Kenyon, C. J. Rex *v.* St. Mary Lambeth, 8 Term Rep. 236.

or non-performance of work is excused in the servant, for some reason admitted by the law itself, without consent from the master. In requiring a compleat year's service, the statute meant no more than that the servant should pay such attention to his duty as the law would compel. Service for that time must therefore confer a settlement.

Service at all lawful times.

Thus if a servant is hired by the year, to work as a weaver or carpenter, at yearly wages; his master cannot compel him to work on Sundays, and he will be held to have served a year, notwithstanding that absence from labour, which is in obedience to law. (1)

According to the custom of the country.

If there be any cases also, where a servant cannot be compelled by his master to labour during the accustomed working time of the week, by reason of the usage of a particular place, they are to be classed under this head of dispensation. As where a pauper was hired for a year, at yearly wages, to work at stamp mills used for the purpose of cleansing and manufacturing tin, and worked therein daily, except holidays and Sundays, according to the custom of tinners; this is no exception in the contract, but a sufficient service, being according to the custom of the country. (2)

So where a servant was hired by a wood-screw-maker for a year, "good earn, good hire," to work for him and no other master, to make screws at so much a gross. By good earn, good hire, is meant that his wages were to depend upon his work; he was to have nothing, if he got nothing. The servant absented himself without leave for a week or a fortnight at a time, to drink or play. His master, on his return, was angry and checked him, *but*

(1) Per Willes, J. Rex *v.* Birmingham, post. 359. *n.* (1).

(2) Rex *v.* St. Agnes, 2 Bott, 322. Pl. 362.

always

always received him again. It was held that a settlement was gained by such service for a year, for whatever constitutes a sufficient performance of the contract, from the custom of the country or nature of the service, is sufficient. (1)

Absence from master's inability to keep the servant.

Cases where the master is unable to keep his servant any longer, from a sudden change in his circumstances, seem reducible to this head; the law considering the service as performed, which the servant was only prevented from discharging by the master's misfortunes. As where a servant, hired at yearly wages, continued in the service till within four or five days of the expiration of a year, when her master becoming a bankrupt, and the messenger taking possession of the house, her mistress discharged her, paying her the whole year's wages. Bankruptcy does not dissolve the contract of hiring, *without the servant's consent*, and therefore the pauper gained a settlement. (2)

A bankrupt.

Information against.

A maid servant, hired for a year, served until within seven days of the end of it; when an information having been laid against her master for keeping a gaming-house, he quitted his house, and told his servants that he had no longer occasion for their services, and then paid the pauper her whole year's wages, and she did not engage in any new service till after the year expired. The master would have kept the pauper, except on account of his being so obliged to quit his house; and the pauper was unwilling to leave his service. This was held to be a mere dispensation with the service, the contract not being dissolved with the consent of both parties. (3)

(1) Rex *v.* Birmingham, Dougl. 333. Both this and the preceding case may be supported as cases of dispensation with the master's consent, for it is found that the master always received the servant back into his service. See Rex *v.* Rusholme. 10 East, 489. ante, 339 (3).

(2) Rex *v.* St. Andrew's Holborn, 2 Term Rep. 627.

(3) Rex *v.* St. Mary Lambeth, 8 Term Rep. 236.

Absence from sickness.

The next instance is, where the absence happens on account of sickness. Here also it is immaterial whether it is with (1) or without the master's consent (2). Neither will it make any difference, that the master does all in his power to put an end to the contract (3): or that the servant is paid the whole year's wages (4), or has a deduction made (5); provided it does not appear to be the intention of *both* parties to dissolve it. (6)

It is also clear that it is immaterial, whether absence on this account be *temporary* in the middle of the year, or continued by reason of a continuance of sickness, until the end of it. As where a yearly servant served only seven weeks, when being in liquor, he broke his thigh by a fall from a beer waggon, and remained twenty-nine weeks in the hospital. On quitting the hospital, he returned to his master, who refused to receive him (the pauper continuing unable to work), but offered him his wages for

(1) Rex *v.* Christchurch. Where the servant was frightened into fits, 17 days before the expiration of her year, and was sent first to Mr. L.'s, a private house, and if Mr. L. refused to admit her, she was to be brought back to her master's house again. She resided at L.'s five days, and then went to an hospital. On the day after her departure, she went back to fetch her clothes, and received her full year's wages, but no words of discharge passed. Burr. S. C. 494. Rex *v.* Ozleworth, an absence for three months, and the pauper received again into the service. 2 Bott, 314. Pl. 315.

(2) Rex *v.* Islip, 1 Str. 423. Rex *v.* Maddington, where a carter was kicked by one of his master's horses, five weeks before the expiration of his year, and went to his friends without his master's knowledge or asking his leave, to get his leg cured. He never returned during the remainder of the year, but went a short time after to receive his wages, when the master deducted six shillings for the absence, to which the servant consented. It was held that this was not like a desertion of the service, but was an absence for a reasonable cause, and that the master ought not to have deducted the wages. Burr. S C. 675.

(3) Rex *v.* Sharrington, Cald. 471.

(4) Rex *v.* Christchurch, supra, n. (1). post.

(5) Rex *v.* Maddington, supra, n. 2. Rex *v.* Sutton, 5 Term Rep. 657.

(6) See post.

seven

seven weeks, and a present, which he refused to receive, and the pauper and his master went to a justice, but nothing was done. It was held that this was a service for a year. (1)

But the service must have actually commenced under the contract, in order to let in the period of sickness, to count as part of the yearly service. For where the pauper a few days before Martinmas, had been hired for a year to commence at Martinmas, but was prevented from going into his place for the first month, by reason of illness, in consequence of which his master refused to receive him, and they came to a new agreement; it was held that the month's absence could not be considered as a constructive service, for the hiring was executory, and the service had in fact never commenced under it. (2)

3. Absence to look for service, &c. Post.

The third class of cases of dispensation is, where the servant is absent for any other lawful cause, as to look for another service (3); or to be hired at a statute fair (4); this is no interruption of the service, although the master do not consent. If a short absence also takes place at the servant's request, for any other reasonable purpose, and it is agreed to by the master, the court has not been inclined to infer a dissolution from that fact only, notwithstanding the use of the word "discharge," which seems at first sight to mean a dissolution of the contract. As where a yearly servant had served till the day before the

(1) Rex *v.* Sharrington, Cald. 471. S. P. Rex *v.* Sutton; where the pauper was deprived of his reason, two months before the expiration of his service; he was then taken away by his father, and did not return, but continued an incurable lunatic, 5 Term Rep. 657.

(2) Rex *v.* Wintersett, Cald. 298. See this case reported more fully, post.

(3) Rex *v.* Potter Heigham, Burr. S. C. 690.

(3) Rex *v.* Islip, post. 364. n. (1).

end

end of the year, when he desired his master to discharge him, as he had let himself for the next year to a person in a distant place, and was removing further from his friends, he wished to go and see them, and pass that day with them, and requested to have that time to himself; to which the master consented, and he was discharged, and paid his whole wages, save sixpence, which he allowed his master for that day. It was held not to be a dissolution of the contract, but an absence with leave. (1)

4. Where master prevents the service. Post.

The fourth case is, where the master discharges the servant without his consent, or having lawful cause, and thus prevents the servant from performing his service.

Under this head are to be classed cases of absence, for the purpose of avoiding a settlement, when fraudulent, and the sessions find the fact of fraud. A case has been already stated, in which it was held, that if an hiring is for less than a year, it will be defective, although it should be found by the sessions to be fraudulent on the master's part (2). But with regard to service, it seems taken for granted in all the cases, that fraud, which vitiates most things, prevents absence from defeating a settlement. The superior court will never infer fraud, which must therefore be found specially by the sessions. (3)

Where the completion of the service is obstructed by any act of violence on the master's part, it cannot injure the unoffending servant, or cause an interruption in his service, whatever the master's motive may be.

As where, on the day before the servant's year expired, the master told him that to prevent his gaining a settle-

(1) Rex *v.* Potter Heigham, post. 366. n. (3).

(2) Ante, 319. n. (2). Rex *v.* St. Phillip's in Birmingham, post, 365.

(3) See Rex *v.* Preston, 2 Bott, 310. Pl. 351., and the cases cited, n. (a) in margin.

ment

ment in that parish, he should go away immediately, which the servant refused to do, insisting to serve out the year; whereupon the master turned him out of doors. This was held such a fraud in the master, as shall not prevent the settlement. (1)

The pauper's master died three weeks after she was hired for a year, and the farm was continued on by his widow and two sons. About three weeks before the end of her year one of the sons quarrelled with her because she threw more sand on the floor than he deemed necessary, and turned her out of doors though she was willing to stay; the next day she returned for her clothes and took from the son as for her full wages what he insisted was the sum for which she was hired, though she demanded more [as her year's wages]. She gained a settlement. A wrongful act of the master cannot dissolve the contract without the servant's consent. She did not hire herself into another service before the end of her year, and did every thing she could to continue in the service from which she was wrongfully discharged. (2)

A servant, three days before his year was up, asked leave of his master to go to a statute fair to be hired, which the master refused; but the servant insisting that he must go, the master replied, "I am resolved that you "shall gain no settlement in the parish, and therefore if "you will go, it shall be for good and all." "No," answered the servant, "I will serve out the year." And thereupon he went, and never returned during the three days. Afterwards, when he returned to be paid, the master, after deducting for another absence, to which the servant agreed, abated sixpence for the three days, which the servant refused to allow; but the master refusing to pay, the servant took the rest of the wages.

(1) Eastland *v.* Westhorsley, 1 Str. 526. See also Rex *v.* Hardingham, Stiles, 168.

(2) Rex *v.* Hardhorn, 12 East, 51.

This

This absence did not prevent a settlement; for the servant knew that his master designed to part with him: and his request of leave of absence in order to get another service, was a reasonable one, which the master ought not to have refused, and the subsequent absence without leave is no desertion of his former service, especially when his declaration that he would serve out the year, and refusal to allow the deduction of the sixpence, are considered, which plainly shew the contract was not dissolved till the end of the year. (1)

So although the master use no violence, yet if he discharge the pauper without his consent, and contrary to law, it will not defeat his settlement. The pauper was hired for a year in H., served three quarters, and then married a woman with child. Of this his master complained to a justice of peace, who thought the matter complained of to be a sufficient cause for the pauper's being discharged, and allowed of his discharge; but made no order in writing touching the matter. The master thereupon discharged the pauper against his consent. The court were of opinion, that this not being a reasonable cause for discharge, and the pauper not having consented, he was to be considered as having performed his year's service in H. and gained a settlement there. (2)

Mistress turns away her servant who submits.

A maid servant was hired for a year, and served until within eight days of its expiration, when on account of some difference with her mistress, she gave her warning that she would leave her service at the end of the year. The mistress on having hired another servant, by reason of some impatient behaviour of the pauper, *discharged her* from the service, but paid her the full year's wages. The pauper accepted the wages, and left the parish eight days before the year ended; but said she would have

(1) Rex *v.* Islip, 1 Str. 423. (2) Rex *v.* Hanbury, Burr. S. C. 322.

served

served her year, if her mistress would have let her. This was held to be a dispensation with the service, and not a dissolution of the contract. For the turning her away, was a mere wrongful act *submitted* to, but not *agreed to* by the servant. Neither thought that they could put an end to the service. The servant, though desirous of going, gave warning to quit *at the end* of the year, and the mistress wished for her own convenience to dismiss the servant before the end of it; but was convinced that she could not dissolve the contract, and therefore paid her the whole year's wages. But it cannot be inferred from the pauper's receiving the wages, that she went away by agreement; *something should be stated to shew that it was voluntary on the part of the servant*, and that she consented to *a dissolution of the contract.* (1)

Absence to avoid a settlement by mutual consent.

It is more difficult to determine how far absence for the purpose of avoiding a settlement, if unaccompanied with other circumstances, is to be deemed fraudulent, so as not to discontinue the service. It seems most reasonable, that when the proposal of absence originates with the master, who may be benefitted as a rated parishioner by defeating the settlement, and it is only acquiesced in by the servant, the inclination should be to consider it fraudulent, so as to lean against inferring that the contract has been in fact dissolved (2) But on the other hand it is hard, if the law, which looks upon the privilege of gaining a settlement as beneficial to the servant, does not allow him the right of avoiding one at the end of his year, in a particular place, by absenting himself a day from service, when he might have originally done so by an exception in the contract. If cases of consent be fraudulent, it is not a fraud upon the servant, but upon the parish in which he was previously settled.

(1) Rex *v.* St. Philip in Birmingham, 2 Term Rep. 624.

(2) Rex *v.* Sulgrave, ante, 355. n. (1).

The

The cases seem to have proceeded therefore upon the following principle: If the absence from service is for the purpose of defeating a settlement, it shall rather be presumed to be under a dispensation, where the circumstances do not clearly shew that the contract has been in fact put an end to. But there is no case in which a mutual agreement to put an end to the contract, though entered into for the avowed purpose of defeating the settlement, has been held void, on the ground of fraud, and some recent decisions are to the contrary. (1)

A servant ten days before the end of his year, told his master that he did not wish to be settled in the parish, and *asked him leave* to go and visit his relations, to which the master consented. After the year was expired, he returned to his master, and hired himself as a day labourer, in which capacity he served for three months; some time after his return, he and his master made up their accounts, and he allowed for his absence in the preceding year out of his daily wages. It was held that he gained a settlement, and that the leave and consent of the master was fraudulent, and a mere evasion of the settlement (2). We have just seen that absence for a day, with consent, that the servant might see his relations, was held constructive service, where the purpose was not to avoid a settlement. (3)

When the master does not object to the settlement.

A servant had continued in the service, until within three days of the end of his year, when being unwilling to gain a settlement in the parish, where there was an house of industry, he requested his master to discharge him, which he accordingly did, and they parted by consent, the pauper abating one shilling for these three days; the court took no notice of the point. (4)

(1) Rex *v.* North Basham, post. 367. et seq.

(2) Rex *v.* Frome Selwood, Burr. S.C. 565.

(3) Ante, 362. n. (1).

(4) Rex *v.* Potter Heigham, Burr. S.C. 690. Ante. 362. (1).

But

But where a servant, wishing to avoid acquiring a settlement in the parish where he served, and to be settled elsewhere, went with his master, three days prior to the expiration of his year, before a neighbouring justice to be discharged, who discharged him, after hearing the master and servant; whether verbally or in writing did not appear; but the master told the justice, that he was welcome to gain a settlement in his parish if he pleased, and then paid him his wages; but deducted one shilling and ninepence for the time wanting to complete his year. It was held not to be fraudulent on the part of the master, for he had no objection to the settlement; it was a solemn discharge by the consent of both parties. (1)

So where a servant had served until within five or six days of the end of his year, which he would have also served, but that some householders of the parish gave him two guineas to leave his master, and go out of the parish before his year expired, he being about to be married. His master insisted upon deducting nine shillings from his wages before he would let him go; the pauper submitted to the abatement, and went away. It did not appear that the master was privy to the two guineas being paid, which was done out of the parish rates, and he received no benefit therefrom, not being rated to the poor. The court intimated a strong opinion, that the year's service had not been completed, and could not confer a settlement, although the absence was for the purpose of avoiding one; but they decided the case upon a defect in the order. (2)

The court seem in these cases to have regarded even the possible influence of the master with a jealous eye. But where he has a right to discharge the servant, by

(1) Rex *v.* North Basham, Cald. 566. Pl. 351. See also Pawlet *v.* Burnham, 2 Bott, 307. Pl. 347. post.

(2) Rex *v.* Preston, 2 Bott, 310.

reason

reason of immoral conduct, he cannot be considered as guilty of fraud in exercising that right, although it defeats the servant's settlement, and the master may be eventually benefitted as a rated parishioner (1); and in all cases of this sort, the only question is, whether the contract has been in fact put an end to.

II. Of dissolutions.

Wherever it appears that there has been an actual dissolution of the contract, the period of absence renders the service imperfect in all cases whatever.

Example.

A dissolution by consent may appear as a fact in the case; as where it is stated, "that the servant parted with "his own consent (2);" or that he quitted the service before the expiration of the year, "without any com- "pulsion on the part of his master (3)," or even that "he departed from" (4), "or left his master's service (5)," or "that his master consented to his leaving the ser- "vice." (6)

Implied.

It may be likewise collected from various circumstances, indicating a determination to put an end to the relation of master and servant. And lastly, it may appear by the parties coming to a new agreement, inconsistent with that under which they had previously lived, which necessarily pre-supposes a dissolution of the former.

By new agreement.

As where an unmarried man was hired for a year from Martinmas, as a servant in husbandry, at about eight pounds a year, with meat, washing, and lodging. In the succeeding January he married, but continued with his master as a menial servant until the ensuing May-day. Some days before which, the master and pauper agreed,

(1) See post. several cases on this head.

(2) Rex *v.* Seagrave, Cald. 247. post.

(3) Sheen *v.* Godalmin, 2 Bott, 310. Pl. 350. As to the effect of a request "to discharge," see ante, 366, 367.

(4) Wickford *v.* Bretford, post.

(5) Rex *v.* Sudbrooke, 4 East, 356. See also post.

(6) Rex *v.* Maidstone, 12 East, 550.

that the pauper should go (with his wife) as a hind, to reside on and manage another farm of his master's in the same township. The second agreement was for a year from that May day; the pauper to have five shillings a week, with a house to live in rent free, and some trifling perquisites. This was held by a majority of the court not to be a prolongation of the former contract, but a new agreement to serve for a year from May-day, which put an end to the former, as being inconsistent with it. (1)

Lord Kenyon, C. J. who differed from the majority of the court, thought that the original contract was not dissolved, *for there was no end of the relation of master and servant even for a moment, during the whole time the latter continued in service*, and the subsequent alteration of situation was not sufficient to effect it.

Alterations in contract which don't dissolve it.

But at all events, to annul the first hiring, the second agreement must be inconsistent with it. A variance in the nature of the service does not defeat the settlement. A footman who was converted into a butler would gain a settlement, by completing a year's service, notwithstanding such a change in his station. (2)

The pauper was hired by his uncle to serve for a year, in his trade of a turner, to be found in board, lodging, pocket-money, and clothes. After serving six months, his master finding him idle, he and the pauper came to a new agreement, by which he was to work in the said trade, and be paid by the piece, and find himself in board, lodging, pocket-money, and clothes. Upon these terms he continued with his master till the end of the year, sometimes working by the piece, lodging and boarding

(1) Rex *v.* Great Chilton, 5 Term Rep. 672. Lord Kenyon, C. J. dissent. See also Rex *v.* Wintersett, post. 378. See also Rex *v.* Overnorton, 16 East, 347.

(2) Per Lord Kenyon, ib.

out of his master's house, and at other times serving in the house as a servant, when he was lodged and boarded with his master. The court were of opinion, that the original contract was not interrupted and wholly done away, but only the terms of it varied. The servant was to work by the piece instead of the gross, and the conduct of the parties subsequent to the new agreement shews that, with respect to the mode of performing the service in the understanding of the parties, the original contract still continued to subsist (1). Also if a minor hires himself for a year, and three months afterward enters into a contract of apprenticeship with the same master by an invalid instrument, it does not do away the former contract of hiring, and he acquires a settlement by continuing in service during the rest of the year. (2)

So likewise a mere change of master does not annul or dissolve the contract. (3)

The cases in which dissolution has been held to take place, will be arranged with reference to the same order of leading circumstances, as has been adopted in cases of dispensation, as by that means the reader will be the better able to compare them.

1. Dissolution where a return to service. Dispensation, ante, 347.

A return to service can have no effect in working a dispensation, when it clearly appears from other circumstances that there has been a dissolution. As where the pauper having served one quarter of his year, upon some dispute between him and his master, the latter insisted on turning him away, and threw down his quarter's wages, which the pauper took up, and went to his father's house, where he continued six days, during which time he looked upon himself as a free man. *He then re-*

(1) Rex *v.* Alton, Cald. 424.
(2) Rex *v.* Shinfield, 14 East, 341.
(3) See ante, 352. et seq. Rex *v.* Hardhorn, 12 East, 51.

turned

turned at his master's request, and continued in the service to the end of the year, when the master paid him the remaining three quarter's wages. In this case the contract was absolutely dissolved; the master insisted upon turning away his servant, and paid him down all his wages that were due; the consent on the other side is by taking the money up. Then how did he come back again? It was upon the master's *request;* there is nothing by which the absence can be explained. The meaning of purging an absence, is where the act itself is doubtful. (1)

The pauper being hired for a year to one Miles, served only three days, when his master, upon a difference arising between them, desired him to go about his business; on which he ran away, and then hired himself to Whitby for a year. Having served him for six months, Miles insisted that Whitby should not keep him in his service. He was then paid his wages to that time, and quitted the service, and went as a labourer to a barge-master for a fortnight, when he returned, at the request of Whitby, into his service, with the consent of Miles, and served seven months, being a month over the year for which he was hired, in order to make up his lost time, and then received his wages. This is a very clear case; here is an absolute dissolution of the contract, by both W. the master and the servant, at the end of six months, whereas the statute requires a continuance in the same service for a whole year, the new service therefore, at the fortnight's end, cannot be connected with the old hiring. (2)

(1) Rex *v.* Gresham, 1 Term Rep. 102.

(2) Rex *v.* Ross, Burr. S. C. 688. Rex *v.* Caverswall, S. P. The servant served until within three weeks of the end of the year; when, on some dispute arising between him and his master, he was, with his own consent, discharged. A fortnight afterwards, and upon his mistress's request, his master being from home, he went again into the service and completed his year. It was held a total dissolution of the contract. Burr. S. C. 461.

Quitting upon a warning.

One of the strongest grounds to infer a dissolution of the contract of hiring seems to be, when the parties separate in consequence of a warning given by reason of a power reserved to either party in the terms of hiring. The pauper's mother had, by her desire, looked out for a place for her some time before old Michaelmas, and the proposed mistress told the mother that she would give her the same wages as her other servants, and wait till she came. But no agreement was actually made until about a week after old Michaelmas, when the wages were for the first time agreed upon, with liberty of parting at a month's wages or a month's warning (1). The pauper continued in the service until the old Michaelmas day following, but had about five weeks before given her mistress notice that she would quit at that time. On old Michaelmas day she came to her mistress to receive her wages, who paid her for the whole year, but told her she wanted a week of serving out her year. The pauper said she was willing to stay another week; but the mistress replied, that it did not signify as she had got another servant in her place, who was then in the house (as she in fact was). Per Lord Ellenborough, C. J. "About five weeks before old Michaelmas day, the pauper gave her mistress notice to quit at old Michaelmas day. The mistress could not object to receive the notice, and therefore looked out for another servant; but when the pauper went to receive her wages, the mistress paid her the whole year's wages, but told her that she wanted a week of serving out the year. The pauper then said, indeed, that she was willing to stay another week; but as the mistress in consequence of the warning which the pauper had given her, and which she had accepted, had provided herself with another servant, she stood, as she had a right to do, upon the warning that had been given, and told the pauper, it did not signify, as she had got another

(1) See a further statement of the terms of the hiring, ante, 316.

servant

servant in her place; on which the pauper left her house. There can be no doubt but that both parties agreed to put an end to the contract before the end of the year. The servant gave above a month's warning, which she had a right to do, the mistress accepted the warning, and both parties acted upon it. And this appears to have been in fact before the end of the year, whatever the servant might have supposed when she gave the warning. (1)

Also a dissolution must be inferred where the agreement to separate is made by consent, and with a view of entering into another service before the year expires: for it presupposes an intention on both sides, that the servant should be *sui juris*, and the contract at an end; and is very distinguishable from cases, where the servant goes to work with other masters for a temporary period, by his original master's consent. (2)

Dissolution at parties' request, ante, 353.

(1) Rex *v.* Rushall, 7 East, 471.

(2) The pauper, 11 weeks before the expiration of his year, having a dispute with his master, in consequence thereof asked the latter to discharge him, who answered he would not unless the pauper would get another man to stand in his stead. He accordingly got one R., and gave him some money out of his own pocket to take his place, besides his wages to be paid him by the master. The pauper stated that when he brought R. to his master the latter stated, "If this man does any other "than well I can send for you, and "make you serve your time out;" to which the pauper replied "very well." On the contrary, the master stated, that "he did not recollect having said "to the pauper that he should expect "him to return; that it was not his "intention to have him back, and that "they parted on bad terms." The pauper, during the remainder of the year, hired himself as a day-labourer in the adjoining parish, and R. served under the new agreement till the end of the year. The court were of opinion that the master's account being evidence to impeach what the pauper had sworn, and the sessions having drawn the conclusion that it amounted to a dissolution of the contract, there was nothing to shew that such conclusion was wrong. (*a*) See ante, 353.

(*a*) Rex *v.* Mildenhall, 12 East, 482.

Thus where a yearly servant before the end of his year went to a statute fair, and hired himself to another master, to go into the service three weeks before the expiration of the year he was then serving, if his master would let him come then; and if not, then at the expiration of his year. The next day the pauper asked his master whether he would let him go, who told him he could not spare him, he must get a new servant first. Some time after he hired one, and told the pauper, "I "have got a new servant, you may go now, I have not "work for you both." The pauper then went to receive his wages, when the master's wife said to her husband, "don't deduct any thing from his wages," who replied, "I don't intend it." The pauper was paid his whole wages, and then went away, being about a fortnight before the expiration of his year. Lord Kenyon—"The distinction between the different cases seems to be this; if the pauper be absent from the service, with the concurrence, remaining however subject to the controul of his master, he may acquire a settlement; because this only amounts to a dispensation with the service: but if the master ever parts with his controul over the servant, then no settlement is gained; and the receiving the whole year's wages don't make any difference. Here he had given up all controul over the servant; he was instrumental in enabling the servant to make another contract with another master; and from what passed between the parties, it was evidently the intention of both, that the pauper should become *sui juris*, and should be enabled to contract with another master. The relation of master and servant no longer continued, for he could not have insisted on the pauper's returning into his service after the wages were paid. (1)

The pauper was hired on Michaelmas day, 10th October, 1797, for a year ending Michaelmas day, 10th

(1) Rex *v.* Thistleton, 6 Term Rep. 185. Rex *v.* Leigh, post. 387.

October, 1798, he continued to serve till the 8th of October, on which day he married, and his master consented to his leaving the service and paid him his full year's wages. On the 9th, the pauper hired himself and went into another service. The sessions having found this to be a dissolution, the court confirmed the order. There was an express renunciation on the part of the master of his right over the servant two days before the end of the year, and the servant's assent was signified by his departure from the service, and contracting the next day an obligation to another master into whose service he entered immediately. (1)

So although the servant's absence takes place for the master's accommodation, it will not prevent a disconti- Dissolution for master's accommoda-

(1) Rex *v.* Maidstone, 12 East, 550. Le Blanc, J. gave the following judgment, "Upon the facts of the case "as it appeared at the sessions, I "think they would have been well "founded in finding as a fact that this "was a dispensation of the service on "the part of the master, and not a "dissolution of the contract; for according to the cases it is always a "question for the sessions to decide, "whether the consent of the master "to the servant's leaving his service "a few days before the end of the "year for a particular purpose, but "paying him his whole year's wages "be a dispensation of the service for "the remainder of the year, is a dissolution of the contract. Here the "servant wanted to marry, and one "entire day before the end of the "year the master gave him leave to "marry and go away from his service. "It was a fair and reasonable conclusion to draw, that if the servant "wished to go away one day before "the end of the service for the purpose of marrying, the master would "have no objection to dispense with "his service, and gave him a holiday "for that one day; for it might be "observed the service would have "ended on the 9th, and the servant "left his master's service on the 8th. "But the sessions not choosing to draw "this conclusion themselves which I "think they might have done, sent "the case to us upon the dry facts "stated, and have not found that the "master did consent to give his servant an holiday, but merely states as "a fact that the master consented to "his *leaving the service*. Under these "circumstances I cannot say that the "sessions have done wrong in quashing the order, though I think they "might have drawn a different conclusion from the facts of the case." Ibid.

tion, and at his request, ante, 355.

nuance of service, if the dissolution is satisfactorily made out from other circumstances (1). The pauper was hired at yearly wages for a year, to come into the service on the 11th of October, being old Michaelmas day, a month's wages or month's warning, the mistress stating that she did not wish to confine the servant for a year. She came the 12th, and served until about a fortnight before *new* Michaelmas-day. Her mistress asked her, *whether she chose to go away on new or old Michaelmas day, assigning* as a reason for asking, *that she had hired a servant who wished to come home on new Michaelmas day.* The pauper said *it was immaterial to her, as she had not got a place, and agreed to go at new* Michaelmas day, at which time the other servant came into her mistress's service. Her mistress was not in a condition of life to keep two servants. The pauper on coming into the service had considered herself as being to live with her mistress until old Michaelmas: she was paid the whole of her year's wages, though when she agreed to go away at the new Michaelmas, nothing was said about it. The court held, that the conclusion whether the contract was dissolved, ought to have been drawn by the quarter-sessions: but they were of opinion, that there was strong evidence to warrant them in holding that the contract was dissolved before the end of the year, the servant not continuing liable to serve the remainder of the year, and the mistress having parted with her right to make her re-assume the service. (2)

Dissolution, when insisted by master without cause.

Neither does it make any difference that the master insists upon dissolving the contract without just cause, and makes use of undue means to influence the servant's consent, provided it clearly appears that his consent is actually obtained.

(1) See ante, 353.

(2) Rex *v.* St. Peter Mancroft, 8 Term Rep. 477.

These

These circumstances may sometimes have weight to induce a presumption, that the absence was rather submitted to, than any actual consent given to dissolve the contract. But where it appears to have been dissolved before the year's service is completed, a settlement cannot be acquired, although the law would have implied such service, if the master had refused to permit its being performed. (1)

In sickness. Ante, 359.

The pauper was hired at a statute held a few days before Martinmas, for a year from Martinmas. He received one shilling for his god's penny, and was to have three guineas for his wages; the pauper fell ill the very night of the hiring, and continued sick and unable to go, and did not go into his service till a month after Martinmas, when the pauper and his mother went to the master's house, who being from home, they were shewn to his wife, who complained that the pauper had not come to his service according to the agreement, and therefore refused to receive him. Whereupon the pauper's mother said, we must fall into your will for wages, and take what you will allow us; and left the pauper in his service, where he continued until Martinmas following: when his mother was sent for, and received for forty-eight week's wages, after the rate of 1s. 2d. per week, being less than the rate of the original wages.

Lord Mansfield C. J. The service had never commenced under the first contract, if it had, no doubt the master must have supported the servant in his sickness, but that is not the question; the point is, that the agreement acted upon here was a fresh agreement when he recovered from his sickness, and the beginning of his service was then. Under the former the mistress refused to receive him. Then considering the old contract

(1) See ante, 362.

at

at an end, the actual service was but for eleven months; that is, to the Martinmas next, and the submitting to the abatement of the month's wages at the end of the year is an affirmance of the agreement made by his mother; and this as rescinding the original agreement, destroys more than the *legal and constructive* service; it shews also that there was no hiring for a year, so that both the hiring and service must be considered as imperfect and ineffectual. (1)

In this case the pauper was disabled by misfortune from executing his part of the contract, namely, coming into the service at Martinmas: and the master refusing to receive him, they came to a new agreement, which was a dissolution of the former under the rule already mentioned (2). But although the sickness happens after the service is commenced, where the master cannot put an end to the contract, but is obliged to maintain his servant; yet if the latter consent to a dissolution, there is no legal or constructive service. For if the servant chuse on account of illness to go away, illness cannot prevent him from coming to an agreement with his master, to put an end to the contract. (3)

Thus where a pauper served until within five days of the expiration of his year, when he went to a statute fair to seek a service for next year. Being taken ill of a fever there, he went home to his mother, and continued ill for six weeks. Having no money to maintain him in his illness, he on the same night desired his mother to go to his master for his money, and to bring away his clothes; the mother went next day, and brought his money all but

(1) Rex v. Wintersett, Cald. 298. Ante, 335. See also the opinion of Buller, J. upon that case, Rex v. Grendon Underwood, Cald. 364.

(2) Ante, 368.

(3) Per Le Blanc, J. Rex v. Sudbrooke, 4 East, 361. & see ante, 360.

one

one shilling, which she told him his master had stopped for the remainder of the year, and gave it to him, together with his clothes, *with which he was satisfied;* and he thought himself at liberty to hire himself to another master if he had been well enough. This is a dissolution of the contract by consent, for the pauper who sent for his wages five days before the year expired, had no right to his wages, until the dissolution of the contract, or the expiration of the year; the master so far as in his power put an end to the contract by deducting the one shilling, which he had no right to do but on the ground that the pauper did not continue his servant for the remainder of the year, and the pauper received the money, saying he was satisfied, and thereby also assenting. (1)

Likewise where the pauper lived under a yearly hiring, till about the middle of April 1796, when being too ill of a fever to work, his master paid him his whole year's wages, *when he left his master's service*, and went down to Lincoln hospital, and never returned into the service again. It was held to be a dissolution of the contract, and that no settlement was gained. For it being stated that he *voluntarily left his master's service, before the end of the year*, it must be taken to be a relinquishment of the service altogether, and not merely that he left his master's house, and this could not be, unless the contract was meant to be dissolved. After that neither party could maintain any action against the other for the affirmance of the contract, or continuance of the service. Neither did the payment of the whole year's wages in advance make any difference; to which, Rex *v.* Godalmin (2), and Rex *v.* Castlechurch (3), Rex *v.* Thistleton (4), are in point; and the court distinguished this case from Rex *v.*

(1) Rex *v.* Whittlebury, 6 Term Rep. 464.
(2) Post. 383. n. (1).
(3) Post. 382. n. (2).
(4) Ante, 374. n. (1).

Christ-

Christchurch (1), for it did not appear there that the servant left the service, when she quitted her master's house, and if Mr. Lemonier could not take her in, she was again to return thither. (2)

Absence for a lawful cause, ante, 361.

So where the dissolution arises from the servant's absence for any other lawful cause (3). A yearly servant absented himself, telling his master he was going to be married, to which his master made no answer. He went and was married, and on his return, said he had no intention of quitting the service; but the master said he would not employ him any longer; and he replied he would go, if he would pay him his year's wages. The master refused to pay him for more than the time he had served, and asked him if he would take his wages, or go before a justice; the master set out about his business, when the pauper called him back, and said he would take the money for the time he had served, and *that he parted with his own consent.* The court considered that these last words were so clear and unequivocal a dissolution of the contract, that they would not suffer it to be argued. (4)

Absence to look for service, ante, 361.

The pauper having served until nine days before the expiration of his year, went away on Sunday morning, in order to get another place, when his year should be up, without asking leave, or mentioning it to his master. He returned on the Tuesday following at six o'clock in the morning, and asked his master what work he should go about; the master told him he might go and serve the master he had worked for the day before. He saw his master an hour afterwards, who then paid him his wages up to that time only. No conversation passed. He then

(1) Ante, 360. n. (1).
(2) Rex v. Sudbrooke, 4 East, 356.
(3) See ante, 361.
(4) Rex v. Seagrave. Cald. 247.

went away, and did not return: he wished to stay out the year, but his master would not let him. This was held to be a dissolution of the contract, for the master refused to receive the pauper into his service; and though the servant wished to stay, it appears that he did not communicate that wish to his master. Both parties did that which put an end to the contract; the one paid, and the other received the wages; it is therefore impossible to say that the servant was constructively in the service after that time. (1)

The general truth of the observation formerly made, that the fact, whether absence from service, is under a dispensation, or subsequent to a dissolution, depends upon the entire circumstances of each particular case, appears from the determinations which have been quoted. In arranging such as have been already detailed, regard has been paid to some leading feature, which may at least point out a sufficient analogy to assist the recollection; but they severally contain circumstantial particulars, which may have all thrown some weight, however small, into the scale of judicial decision.

Grounds for distinguishing between dispensation and dissolution.

The actual condition of the parties, the reasons for leaving each other, the manner, and, as it were, temper of parting, are of importance in leading to such a conclusion where the actual conversation between the master and his servant is equivocal and indecisive. It is from these minute particulars that the conclusion must be drawn, if there are none of a more marked characteristic, such as the servant's going into another service (2), or the master's engaging a new servant in his place (3), or their parting upon notice given under the terms of hiring. (4)

(1) Rex *v.* Clayhydon, 4 Term Rep. 100.

(2) Rex *v.* Thistleton, ante, 374.

(3) Rex *v.* St. Peter's Mancroft, ante, 376.

(4) Rex Rushall, ante, 373. See also Rex *v.* East Kennet, post. 397. Rex *v.* Grantham, post. 397. Rex *v.* Upwell and Rex *v.* Corsham, post. 398.

Thus

Thus it has been already seen, that where the servant passed the last three or four days of his year at his father's with his master's consent, and afterwards when he received his year's wages, no deduction was made, it was considered as a dispensation with the service (1). But a very slight alteration of circumstances has been held to warrant a contrary determination; as where a servant 11 days before the expiration of his year went away with his master's consent, *and took his clothes with him, and received his whole year's wages*, this was considered as a clear dissolution of the contract, and that the service was not constructively performed for a year. (2)

But where, on the other hand, the pauper could not say whether he served the last three days, or went away without serving them, but that he received his whole year's wages, "it was thought that this at least seemed to imply the master's consent or permission (3)." Indeed this case might be supported on a further ground, that there being a doubt as to the fact of service for the last three days, the payment of the whole year's wages was proof of the service; for it is presumptive evidence, that the service is performed, since a title to the wages could only accrue to the servant thereby.

Effect of paying wages.

From these and the various other cases in which the manner of paying wages is stated, it appears that it is a circumstance which may serve to explain whether an act in itself equivocal amounts to a dispensation with service, or a dissolution of the contract. In this respect not only payment of the entire wages, or the subtracting of part, have been relied upon as material, but also whether it has been made at the time when the absence was about to

(1) Rex S. Undermilbeck, 5 Term Rep. 387. ante, 353.

(2) Rex *v.* Castlechurch, Burr. S. C. 68.

(3) Rex *v.* Milwich, Burr. S. C. 433.

take

take place, or delayed to the conclusion of the year. The payment of a year's wages gives rise to the presumption, that a year's service has been performed either actually or constructively; while a deduction of part gives equal strength to the contrary inference. If the payment is deferred to the expiration of the year, notwithstanding absence, it warrants a supposition, that the contract continued to subsist by which they were then made payable. On the other hand, if they have been discharged previously, this renders it probable that a dissolution took place; for it is only in consequence of the agreement having terminated, that the master could be compelled to make, or the servant enabled to enforce, payment. It may even afford room for some distinction, whether a deduction is made during the year, when it may be evidence of an intention on the master's part to dissolve the contract, and of an acquiescence by the servant; or at the termination, when the latter may be supposed to have surrendered his right to the whole, in the pressure of his immediate wants, or the apprehension of a tedious litigation. But these circumstances are only of importance where the case is doubtful in other respects.

Thus where a servant served a whole year except one week, which he neglected to serve, because he and his master could not agree respecting the wages, he should have the ensuing year. He therefore quitted his service without *any compulsion* on the part of his master, a week before the year expired, but his master paid him his wages for the whole year. It was held that the words "*without compulsion*," were to be understood, that he had quitted the service by mutual consent, and therefore the service was interrupted. (1)

By 37 Geo. III. sect. 22. the inrolment of a servant as a militia-man, by virtue of that act, shall not rescind

37 Geo. III. s. 22. Absence in militia.

(1) Sheen *v.* Godalming, 2 Bott, 310. Pl. 350. See ante, 368.

the

the contract, or vacate the employment between him and his master, unless the militia in which he is inrolled shall be embodied or called out by His Majesty, or ordered so to be, in pursuance of the act, or unless she shall leave the service for the purpose of being trained and exercised for the space of twenty days, in pursuance of the act, and shall not return to the same service at the end of such twenty days, or as soon after as reasonably may be, allowing an abatement from his wages in proportion to his absence from the service, to be settled by a justice of peace.

Dissolution by a magistrate.

It has been already shewn, that if the master applies to a justice to have his servant discharged, and his cause of complaint does not warrant it, the servant's dismissal against his consent, will not vitiate the service, where the magistrate makes no order, although he should be of opinion that it is a valid cause of discharge. (1)

On the other hand, if the master and servant voluntarily go before a magistrate, and the latter is discharged, it amounts to a solemn dissolution of the contract. (2)

The pauper was hired for a year at fifty-five shillings wages, and (if she behaved well) two pounds of wool. She served for about eight months, when a dispute happening with her master, about some stockings which had been burnt, he dismissed her from his service. She applied to a magistrate, and when before him, was charged by her master with neglecting to feed his pigs and burning the stockings. She was desirous of continuing in the service, but her master refused; and the magistrate ordered her master to take her back into his service, *or pay*

(1) Rex *v.* Hanbury, Burr. S. C. 322. ante, 364.

(2) Rex *v.* North Basham, Cald. 566. ante, 366. n. (3). As to how far a master can discharge his servant for immorality of conduct during service, without the interference of a magistrate, see post. 391.

her

her the whole of her wages. He refused to take her again, but paid her the whole of her money, but not the wool. The pauper, from the time she received her wages, offered herself as a servant soon after to several persons. Lord Ellenborough, C. J. We are not called upon to say whether the magistrates had a right to discharge the servant from her service; it is enough that he proposed an option to the master, to take the servant back, or pay her the whole of her wages. The master refused to take her back, but agreed to pay the whole wages, and did pay them; and the servant shewed her assent to the dissolution of the contract by taking the wages and offering her services to other persons. Both parties gave the magistrate the power of dissolving the contract, by shewing their assent to what he directed in that respect. Then, after all this could either the master or servant have maintained an action against each other, the one for not performing the remainder of the service, the other for not employing her during that time? This is the true question to be considered; and I should not wish to carry the idea of dispensation further than it has been already carried; which in many of the cases seems to me to have been stretched as far as ingenuity could go, upon the false idea that the servant had *a right* to acquire in gaining a settlement, as if he must not have a settlement at all events, in one place or another. I do not mean however to disturb any of the cases which have been already decided; but I am not inclined to carry the decisions further, from the plain words of 8 & 9 W. 3. c. 30. which are, that no servant shall gain a settlement, "unless he shall continue and abide in the same service during the space of one whole year;" and it seems to me, that when the parties stand in such a situation, that neither the master can compel the servant to come back, nor the servant compel the master to take her back, and neither have any legal means of compelling redress against the

other, that there is a dissolution of the contract. Lawrence J. cited R. *v.* Thistleton (1), R. *v.* St. Peter's (2), as deciding that if the master once parts with the controul over his servant, and cannot call upon him for his service, no settlement is gained. (3)

Servant goes into a new service.

The pauper, five days before the expiration of his year, went with his master's leave to a meeting called a mop, to look for another place. He returned at three o'clock next morning with some ribbands in his hat. The master in the course of the morning observed, that he supposed masters were scarce at the mop, and that he had enlisted for a soldier, and told the pauper he should serve him no longer. The pauper told his master he had not inlisted (as the fact was), and that he wished to stop his year out. But the master said he should stop no longer, and at the same time offered him his wages for the time he had served, which the pauper refused. He said he would have accepted his full year's wages if they had been then tendered, but that he had rather stay out his year. He left his master's house immediately, and never returned; but having taken out a summons, next day both appeared before a justice, when the pauper applied to the magistrate to direct his master either to receive him into his service for the remainder of the year, or to pay him his whole year's wages, and the magistrate verbally directed half a crown to be deducted from the year's wages, and retained by the master. On the same day the pauper hired himself, and entered upon a new service. His former master, a week afterwards, paid him his full year's wages. The sessions were of opinion that he gained a settlement by this service. But the Court of King's Bench quashed their order. Lord Ellenborough, C. J. How can there be said to have been a constant refusal in the servant to

(1) Ante, 374. n. (1).
(2) Ante, 376. n. (2).
(3) Rex *v.* King's Pyon, 4 East, 351.

put

put an end to the contract, when he actually entered into another service before the time when it would have expired. That is an insuperable difficulty. That he did not receive his wages before the year was out cannot vary the case, for he would have received them at the time if offered. The case of King's Pyon is almost the same in terms as the present. The magistrate was made in both cases a sort of arbitrator between the parties, and both parties acquiesced in putting an end to the contract. (1)

The case of King's Pyon was decided upon the ground that both parties went before a magistrate, *and agreed* to leave the decision of their dispute to him, and he hearing what was urged on both sides, gave an option to the master to take the servant back, or pay her the whole year's wages, and both parties went away, acting as if they acquiesced in that determination (2): and the same principle is referred to in that of Rex *v.* Leigh.

But there has been a determination that the contract of hiring between master and servant may be dissolved, even against their consent, by an order of removal made and executed pending the service, and unappealed from.

Service interrupted by order of removal.

A servant hired for a year served till within six weeks of the expiration of his time, when he was taken up on a charge of bastardy, and married next day. He then returned to his master, who had made no complaint, and did not discharge him. Two days afterwards he was removed by an order of removal to the place of his last settlement, where he continued four days, and then returned to his master's service, who willingly received him again. He continued in his service till the end of his

(1) Rex *v.* Leigh, 7 East, 539. (2) Per Le Blanc, J. 4 East, 355.
See also Rex *v.* Welford, post. 393.

year, which expired about a month after his return, when he was paid his full wages. Here the circumstances of the pauper's apprehension on a charge of bastardy and marriage were laid out of the question, for it was competent to the master to receive him again after he was discharged out of custody, if he pleased. But the two judges present thought that the order of removal being unappealed from, put an end to the service, for the pauper could not legally return to the parish to fulfil his contract. He could not be liable to an action by his master for not completing it; and if he had been indicted for disobeying the order, it would have been no defence that he returned to complete his agreement. If the law intervenes, and says the party shall not complete the contract, it puts an end to it; and as the pauper served only a month after his return, he could not gain a settlement; for the act subsequent to the order by which he was to gain a settlement, should be complete in itself. (1)

The service hitherto shewn to be incomplete, is where a dissolution of the contract had either taken place at the

(1) Rex v. Kenilworth, 2 Term Rep. 598. This case seems considerably shaken by Rex v. Fillongley, 2 Term Rep. 709. For the magistrates have no right to put an end to a contract between parties without their consent. Lord Kenyon states as a distinction between that case and the present, that it was one of residence on a tenement, but this is of a master and servant, where justices have power to put an end to the contract. But in Rex v. Ozleworth, Burr. S. C. 302. An order for removing a yearly servant, was quashed upon the ground that he was actually in the service of his master, and could not be removed from such service. In Rex v. Marlborough, an order of removal of a maid servant, who had been got with child within the year of service, was quashed, for till the year be out, none shall disturb the party from serving; and since she is not removeable, if she leave her master without his consent, she may be sent back to her service, 12 Mod. 402. 2 Bott, 306. Pl. 346. See also Lord Mansfield, C. J. Rex v. Brampton, Cald. Rr. Rex v. Hardingham, Stiles 168. 2 Bott, 306. Pl. 345. 22 Resol. of Judges of Assize 1633. Dalt. 235. and Rex v. Alveley, 3 East, 563.

time

time when the servant was about to quit his master, or immediately upon his return after an absence, when, in contemplation of law, it would be referred to the moment at which the absence began.

III. Service incomplete, though contract continues.

We come now to consider the third case of absence from service, namely, where the contract continues, but the master's consent to the absence cannot be implied. (1)

That a settlement may be defeated by this means, seems to have been determined in one of the earliest reported cases upon the question of yearly service.

Covenant servant.

A covenanted servant three weeks before the expiration of his year, quitted the service with his master's consent, and abated from his wages in proportion to that time. It was contended in favour of this being a good service, that being a covenant servant, it must be presumed to be by deed, which could not be discharged by parol consent, and therefore he continued a hired servant during the year. But the court thought that for the purpose of settlement there was no differenee between a covenant by deed, and an agreement by parol. If the hiring be by covenant, perhaps it is not to be destroyed by such consent, and an action may be maintained on it; but as to a settlement, here is a clear discontinuance of the year's service. There is no fraud found, nor the appearance of any on the master's part: can he oblige his servant to gain a settlement *nolens volens?* The statute of 3 W. & M. c. 11. [8 & 9 W. III. c. 30.] says that he must serve a year; now this man has not served a year. (2)

This class of cases exists only where there is no discharge by mutual consent, nor a valid one by a justice's order,

(1) Ante, 344. 2 Bott, 307. Pl. 347.
(2) Pawlet *v.* Burnham, 1 Geo. I.

Absence caused by the master.

According to the words of the statute, any interruption in the year's service renders it incomplete, unless there is a supposed assent by the master, or an exemption created by operation of law. Some cases seem adjudged upon this principle, although the contract for service continued to subsist; for the absence being wilful on the servant's part, and the master's assent directly negatived, there is nothing to warrant the inference of an implied consent. If a servant is guilty of such misconduct as justifies the master in forbidding a continuance of the service; as where a woman is pregnant, or a man the putative father of a child likely to be born a bastard; and he does so, the service is incomplete, although the contract is not formally dissolved. It is no dispensation from service: for the master having a right to prevent its continuance, and having done so, his consent that such absence shall be deemed service under the contract cannot be inferred against the fact. Neither is it constructive service by operation of law; for the law will not consider the service as performed during absence, where the master is guilty of no injustice in prohibiting, and the servant has no lawful excuse for not performing his duty. (1)

Absence by the servant.

On the other hand, if the servant wilfully withdraw, either from his own or his master's misconduct, this may be a mere interruption of service in the first instance, at the master's option, and at the servant's in the second.

But if the master in either case request the servant to return and complete his service, and the latter refuse, it is impossible to imply the master's assent to subsequent absence, and the law can raise no inference in the servant's favour, against his refusal. Such cases may,

(1) Ante, 357, 358.

and have occurred without an actual dissolution of the contract, since that cannot take place, unless by the interference of a magistrate, or by the parties' mutual consent. (1)

The court seem however in some cases to have thought that the dismissal of a servant for immorality by the master, amounted to a dissolution of the contract, although it took place without a magistrate's intervention, and against the servant's consent.

Servant turned away with child.

A master finding his maid servant to be with child, turned her away three weeks before the expiration of the year, and paid her the whole year's wages, and half a crown over, whereupon she went home to her father's. The pauper said on her examination, that she was willing to stay her year out, if she might, as she was able to do the work; but it was immaterial to her whether she staid or went, as she had received her whole year's wages; and that she was not half gone with child when she left her service, and hoped she could have done the work till the end of the year.

If the sessions had stated as facts in this case what they set forth in evidence, there was perhaps sufficient to warrant the inference of a dissolution by consent; but the court put it on the principle of an actual dissolution by the master.

Lord Mansfield C. J. The question then is, is this contract dissolved within the year? The answer depends upon this; has the master done right or wrong in discharging the servant for this cause? I think he did not

(1) Per Lord Kenyon, Rex *v.* Grantham, 3 Term Rep. 754. where the servant refused to stay, post. Temple *v.* Prescott, where the mistress discharged the servant not for immorality, but sauciness. Cald. 14. n. c.

do wrong; the marginal note cited from Viner (1), whatever degree of authority it may be entitled to, is well warranted in principle; if the master agrees to the contract's going on, the overseers, it is true, shall not take her away because she is with child; but shall the master therefore be bound to keep her in his house? To do so would be *contra bonos mores;* and in a family where there are young persons, both scandalous and dangerous. Where a servant's absence is said to be purged (which is an improper expression) by receiving him again, *the receiving only explains, and shews the nature of the absence;* the consequence of it indeed is, that such a reception must generally be considered as amounting to a dispensation, and thereby subjects the master to the payment of the whole wages: *but the effect of a positive act of the master, i. e. the dismission of his servant,* shall never be done away by an implication arising from the payment of his whole wages. (2)

Servant for a supposed criminal intimacy with a girl with child.

So where a yearly servant in husbandry served till three weeks before the expiration of his year, when the master, on account of a *supposed* criminal intimacy between the pauper and a servant girl, then big with child, who had lived with the master, but was discharged from the service, insisted upon his quitting the service, and discharged him accordingly. The master offered him all his wages but four shillings, which he insisted upon detaining as a satisfaction for the loss of service, for the three weeks. This the pauper, who would have staid if his master would have let him, refused to allow. The pauper, after he was turned out, applied to a justice of peace to receive his full wages, but being told by him, that he could not, and having no money to subsist on, he accepted what his master had offered him, with the abate-

(1) Rex *v.* Netleborough, Vin. Abr. tit. Removal. (C)

(2) Rex *v.* Brampton, Cald. 11.

ment

ment for the three weeks. No order was made by a justice or justices for discharging him. The court seemed clear, that if the fact of criminality had been positively stated, it would have come within the principle of the foregoing case. It went down to be restated on that point, when the fact of criminality being positively found, the case was abandoned. (1)

But supposing the master's right of dissolving the contract to be established by these decisions, where a lawful cause of dismissal exists, it will not reach cases of absence, by reason of an offence, for which the master has no authority to discharge the servant, and where the latter refuses to acquiesce. Lord Mansfield and the Court of King's Bench seem therefore to have resorted in a subsequent case to the principle of incomplete service already stated. (2)

Servant hired after offences committed, and afterwards discharged for it.

A yearly servant was apprehended four days before the termination of his year, by a justice's warrant, charged by a woman with having gotten her with child, *which had been born a bastard about six months after the commencement of his year.* He was kept in custody by the parish officers until the end of his year; his master, on the day of his apprehension, settled his account of wages, saying he might not see him again: he then deducted one shilling on account of his not serving till the end of his year, saying that though he had no objection to the pauper's gaining a settlement, yet that perhaps the other farmer's might. The master did not in any other manner assent to or dissent from the absence.

Lord Mansfield stated that he had no difficulty to say, that a master hiring a servant after an offence committed, and that not in his own house, shall not at the close of

(1) Rex v. Welford, Cald. 57. (2) Ante, 389. et seq.

the

the year discharge him under this pretence (1); I do not go upon that ground, nor upon the consent or implied agreement, to go before the end of the year, for there was none; it was against the intention of both parties, that it should affect the settlement. There was no fraud intended, because there was no agreement; nor did the master intend to prevent or promote the settlement, but he deducts a something to leave that question open, which it was the object of other persons, who were interested, to have discussed. The true point is, supposing no wages paid, and no agreement, here are four days wanting in the service, and it is by means of his own act, that the servant becomes incapable of completing it. His conduct is an offence against morality and the laws, by what jurisdiction soever those laws are administered, and the consequences of it are equivalent *to a wilful absence.* If an action had been brought for his wages, he could not recover upon a *quantum meruit* for those four days. Buller J. There must be a year's service either actual or implied; there is no actual service, and the case affords no circumstance that will warrant an implication; he did not gain a settlement. (2)

Absence from confinement as father of a bastard.

The pauper, within eight or nine days of the expiration of his year, was committed for not giving security to indemnify the parish as the father of a child likely to be born a bastard, or entering into a recognizance to appear at the quarter sessions, his master being one of the churchwardens, and one of the persons that apprehended and went with him to Bridewell. The day on which his year expired, he gave his own bond to indemnify the parish, and on the same day, his master, with the other officers, went to discharge him; the master then paid him his

(1) Quære if this can extend to an unmarried female who is with child when hired. See Rex *v.* Brampton, ante, 392.

(2) Rex *v.* Westmeon, Cald. 129.

wages

wages agreed for, deducting four shillings, (contrary to pauper's consent,) for the time he had been in confinement; it was argued, that the contract subsisted till the end of the year, otherwise the wages would have been paid, when the pauper left the house, and also that it was a fraudulent act, in order to prevent a settlement.

Lord Mansfield C. J. The single question is, whether the pauper served his year? *In fact*, he certainly did not. Did he then constructively? There is not a pretence that the master consented to dispense with the time which the pauper did not serve: there is not a colour of fraud in the master's conduct. The servant's absence was the consequence of his own criminality. His imprisonment was not illegal. There is no doubt. Buller J. There must be either an actual or an implied service; here is no actual service: from whence is the court to imply one. (1)

What proves that there is no absolute dissolution of the contract in these cases is, that absence on this account may be cured like any other, by the master's taking the servant back again. Thus where a yearly servant was apprehended on a charge of bastardy, married the next day, and his master did not make any complaint, or discharge him from his service. On the third day he was removed to his settlement, but returned to his master, (being absent in the whole nine days,) who received him again, and at the end of his year paid him his full year's wages. Per Buller J. The circumstance of the pauper's having been apprehended on a charge of bastardy, and of his marriage I lay entirely out of the question, for it was competent to the master to receive him again after he was discharged

(1) Rex v. North Cray, Cald. 475.

out

out of custody if he pleased, and the servant might have served his master after he was married as well as before.(1)

May be a dissolution by consent.

There are some cases however in which it was unnecessary to resort to this rule, in order to determine the settlement, because a dissolution of the contract evidently took place by consent.

As where the pauper being hired from Michaelmas to Michaelmas, at seven pounds wages, served till May, when hearing that there was a warrant out against him for getting a bastard child, he went to his master, and told him, he must be off, and asked him for money to go off with. His master gave him three guineas and a half, and he ran away, leaving some clothes and his threshing tackle, but was taken up two or three days after, and obliged to marry the woman. After nine days absence, he returned to his master's house for his threshing tackle and clothes which he had left behind; upon which his master said, "where are you going," and the pauper answered, "I don't know;" upon which the master said, "you may as well work for me again, as for any other," to which the pauper agreed, and continued to work there to the end of the year without any fresh agreement, and at the expiration received, including the three guineas and a half before paid him, his seven pounds wages, all but half-a-crown, which the master deducted for his absence. The pauper, when he ran away, never thought of going back to him again, but considered himself as discharged. The court held that this was a dissolution of the contract. When the servant desired to be off, it meant from the service, and when he went back, he does not claim to be restored in his state as a servant upon the old agreement, but he comes back for his clothes; and then the

(1) Rex v. Kenilworth. 2 Term Rep. 589. ante, 388.

con-

conversation that took place on both sides is decisive evidence of a new contract. (1)

The second case is, where the servant refuses to perform his contract by reason of the master's ill usage. As where three days before the expiration of the servant's year, his master came home in liquor, abused the pauper, threw him down, and afterwards turned him out of doors. The next morning the master would have had him return to his service, and stay the remainder of the year; but the pauper refused, and threatened, that unless he paid him the whole of his wages, he would complain of the ill usage he had received to a magistrate. The master then agreed to pay him his full year's wages, and he left the service contrary to the express request of his master. Per Lord Kenyon, C. J. It has been urged that this was an absence for a reasonable cause on account of the ill treatment of the master: but here there was no *animus revertendi*, which distinguishes the present from the class of cases alluded to. The servant was ill used, though he could not have left the service without his master's consent, or without applying to a magistrate to be discharged, yet the master did consent to the servant's leaving him, and both agreed to put an end to the contract. Ashhurst, J. The paying the whole wages was not intended to operate as a dispensation of the remainder of the service, but in redemption of the master's credit. (3)

2. Master's misconduct (2).

Servant turned out.

So where a servant, sixteen days before the expiration of her year, was kicked and beaten by her master, she complained to her father of the ill treatment, and in conjunction with her father, required her master to dismiss her, under a threat of applying to a magistrate for redress

Servant beaten.

(1) Rex *v.* East Kenner, Cald. 562.
(2) Ante, 376.
(3) Rex *v.* Grantham, 3 Term Rep. 754. ante, 391.

on

on account of the assault. The master then paid her the whole year's wages, and told her she might serve the remainder of the year; but she refused so to do, and left the service; this was considered as a clear agreement to put an end to the contract, before the expiration of the year, on the authority of the foregoing case. (1)

Finally, where a yearly servant continued to serve until within a fortnight or three weeks of the expiration of the year, when, in consequence of his master's kicking him, he would not stay, but went to his father's house; he returned before the end of the year with his father, and received the whole of his wages, and half a crown for himself: his master asked him to stay, *but he refused*, and went back to his father's house. The year's service was held incomplete, upon the authority of the two preceding cases. The payment of the whole year's wages was to prevent an action, and argues no consent on the master's part to dispense with the service. (2)

These cases seem to rest upon the ground of a dissolution by consent, which the second appears to have been; but in the others, there was, from what Lord Mansfield calls "a wilful absence," a defect in the service, and it seems difficult to infer a dissolution by consent, especially in Rex *v.* Grantham, where it is found that the pauper left the service contrary to the express request of his master. (3)

(1) Rex *v.* Upwele, 7 Term Rep. 438.

(2) Rex *v.* Corsham, 2 East, 303.

(3) Lord Kenyon states however that "both parties agreed to put an "end to the contract." See also Rex *v.* Hardhorn, ante, 370.

SECT. IV. PART II.

Of Connecting Services under Several Hirings.

Same service what?

The 8 & 9 W. III. c. 30. enacts, that the person shall not only be hired for a year, but continue and abide in the same service for that period.

A year's service may be under different contracts of hiring, performed with different masters, and in different places. It is therefore necessary to examine how far it is considered as *the same*, notwithstanding the occurrence of any, or all these circumstances.

Year's service not to be under yearly hiring.

Although 3 & 4 W. III. requires an hiring, and 8 & 9 W. III. service for a year, yet the service need not be performed under the yearly hiring. They must be coextensive in duration, but need not be cotemporaneous; for the statutes do not expressly declare that the service shall be for that year for which the servant is hired, or even for a whole year afterwards. The words are satisfied, if there be an hiring, and a service for a year; and it is said that the intention is also complied with, "which "was to prevent persons of no credit from intruding into parishes; the hiring for a year being thought "necessary to shew that the person had credit enough "to be hired for that time by a parishioner, who had "so much confidence in him. And another consideration "was, the benefit received by the parish from person's "labour for a whole year." (1)

(1) Per Lee, C. J. citing Lord Magdalen, Burr. S. C. 116. Rex v. Macclesfield, C. J. Rex v. Fifehead Croscombe, Burr. S.C. 256.

Service

Service therefore under a yearly hiring, will connect with service under other hirings, but subject to certain rules and restrictions.

Reason of connecting services.

This construction was given to the statutes soon after the 8 and 9 W. III. passed (1). It was founded on a strict interpretation of their provisions, which the court would not carry beyond the letter, from an opinion that they were restrictive of the subject's liberty, and in derogation of a common law birth-right (2), and that the power given to parish officers should be confined to narrow limits, since the dread or suspicion of anticipated burthens, by reason of future poverty, might form the sole reason for removing the industrious poor (3). But judges, who have held themselves bound by the authority of this decision, have questioned its propriety (4). Indeed, the design of the statute seems to point to a contrary construction; and it has been stated, that the place of settlement can be of no consequence to the pauper, since he is equally intitled to support wherever it may be. (5)

Of connecting the year's service and hiring.

But as the law stands settled, if there is an hiring from March to Michaelmas, *and then an hiring for a year*, service, under the first hiring, may be connected with service

(1) 10 W. III. Rex *v.* Overton. Burr. S. C. 549.

(2) Holy Trinity *v.* Garsington, Cas. Sett. & Remov. 72. Per Probyn, J. Rex *v.* Fifehead Magdalen, ante, 399. n. (1). Rex *v.* Aynhoe, post. n. (4). Per Lord Mansfield, Under Barrow and Bradley Field, Burr. S. C. 548.

Settlements are given as a reward for labour, and the poor-laws in favour of them have always been constructed liberally, because they are made in restraint of liberty; every man being anciently free to go wherever he had the best probability of maintaining himself. This was decided by the court in the case of Holy Trinity *v.* Garsington. Per Lee, J. St. Maurice *v.* St. Mary Kallendar, 2 Bott, 158. Pl. 203.

(3) Ante, 250. But the law is altered in this respect by 35 Geo. III. c. 101. ante, 253.

(4) Rex *v.* Aynhoe. 2 Bott, 251. Pl. 298.

(5) Ib. Per Lord Raymond, &c. Per Lord Ellenborough, Rex *v.* King's Pyon, 4 East, 351.

vice from Michaelmas to the ensuing April, under the year's hiring, and confers a settlement, although the servant leave his place in April, and never fulfils his yearly contract. (1) This is put as one of several parallel instances to be met with in the books, and which differ from each other in accidental particulars only. (2)

Duration of the minor hirings, and nature of the services immaterial.

The mere circumstances of the number and duration of the hirings are immaterial to the connection of services, provided one is for a year. The rest may be for successive years (3), or months, or even weeks (4). Neither is it necessary that the services to be performed under each should be *of the same kind.* It may be as an out-door servant under one, and a family servant under the other (5). He may be employed, first, to milk and plough; and secondly, as a carter. (6)

In most of the reported cases which involve the question of connected service, the minor hirings under which the service was performed have *preceded* the contract of hiring for a year.

Qu. Whether such service may be subsequent to the yearly hiring?

But another question arises, namely, how far service under minor hirings, subsequent to the agreement for a year's service, will unite with antecedent service under that agreement. Such a case cannot occur unless there

(1) Rex *v.* Overton, ante, 400. n. (1).

(2) Service under a minor hiring for 11 months was held to connect with service for eleven months under an hiring for the succeeding year. Brightwell *v.* Westhalley, 2 Bott, 249. Pl. 296. See also Hanmere *v.* Ellesmere, 2 Stra. 878. Eardisland *v.* Leominster, 2 Bott, 253. Pl. 300. Rex *v.* Under Barrow and Bradley Field, ante, 400. n. (2). Rex *v.* Croscombe, Burr. S. C. 256.

(3) Rex *v.* Croscombe, ante, n. (2).

(4) Rex *v.* Bagworth, Cald. 179. Where the minor hirings were by the week, and the wages received by the week, and the pauper considered himself at liberty to part at the end of any one week. Rex *v.* Sutton, 1 East, 656. post. 409. n. (1).

(5) In Rex *v.* Great Chilton, 5 Term Rep. 672.

(6) Rex *v.* Sutton, ante, n. (4).

is a dissolution of the original yearly hiring, and an unbroken continuance of the service under some other. This may happen within the year for which the yearly hiring was made, as there may be a year's connected service during that period, and yet not under the yearly contract; for the parties may dissolve their original agreement, and enter into a new engagement on the same day, under which the servant may serve the remainder of his year.

Thus, if a servant be hired for a year, and having served a month, agrees to serve eleven under a new bargain; there is an hiring for a year, and connected service for a year, but not under the yearly hiring. Looking to the principle upon which services are allowed to connect with the year's hiring, there seems no reason why such service should not confer a settlement, unless a *voluntary* dissolution of the year's contract prevents the union of successive services.

The various cases in which constructive service is stated to depend, solely upon the circumstance *whether there has been a dispensation with service*, or *a dissolution of the contract*, seem to assume by this statement of the question, that such services do not connect. (1)

But none of the cases upon the sufficiency of service turn solely upon the point of dissolution. A chasm was created in the service by absence, after the contract was dissolved. (2)

Collateral determination. Rex *v.* Grendon Underwood.

This doubt, although not expressly decided, seems at least collaterally determined in Rex *v.* Grendon Underwood (3). The pauper, on the Friday before Michaelmas-day, was hired from Michaelmas to be a carter, and

(1) Ante, 344. (2) Ante, 370. et seq. (3) Cald. 359.

had

had one shilling earnest, and was to have six pounds wages, and go into his master's service the Wednesday after Michaelmas-day. The pauper accordingly came that day to his master's, where he had some refreshment; and his master told him he had hired another servant in the place he had hired him to do; but that he wanted a man to milk and go to plough, and if he liked that work, he might stay. The pauper thinking himself not well used, refused that service, and the master told him he might keep his earnest, and go about his business; upon which the pauper said, "Am I at liberty to hire myself to any "other person?" and his master answered him in the affirmative; both the master and pauper looking upon themselves at liberty from their contract with each other. Upon this the pauper left his master's house, taking his clothes with him, and went to an alehouse about half a mile off, in another parish. In the course of the same afternoon, the master met with him there, *and hired him to serve the place of milkman, and to go to plough, and gave him two shillings and sixpence earnest, and agreed to give him six pounds six shillings wages to serve him from that time till Michaelmas;* upon which the pauper immediately entered into his master's service, and continued therein until the next February; when his master's carter having left his place, *his master hired him to serve the place of carter from that time to Michaelmas, and gave him one shilling earnest, and agreed to give him ten shillings and sixpence additional wages;* and the pauper continued in the service until the Michaelmas, and received his wages.

Here were three distinct hirings, bound by different earnests, and at various rates of wages. The only question raised was, whether the original hiring from Michaelmas was an hiring for a year, with a dispensation of service until the ensuing Wednesday; or whether it was a hiring from that Wednesday, and therefore short of a year by the interval from the preceding Michaelmas.

But as it was admitted, that the year's service was complete, the case decides, that service under subsequent minor hirings will connect with that under the original yearly engagement.

Rex *v.* Wintersett.

The question might also have arisen in Rex *v.* Wintersett (1); but that case was decided on the ground *that no service had taken place under the original hiring.* Buller, J. relied particularly upon that circumstance, as forming the distinction between it and Rex *v.* Grendon Underwood.

Rex *v.* Adson.

The incompatibility of such services to unite, would also have decided Rex *v.* Adson (2), in which there was a dissolution of the contract within the year, and an uninterrupted service for the remainder under a new agreement, but the point was not made. The inference, that it was not mentioned because untenable, derives much weight, from considering that the judges originally differed in opinion (3). Indeed, no solid distinction seems to exist between contracts which expire by efflux of time, and those which are put an end to by mutual consent in order to let the parties into a new agreement, and the principle which regulates their connectability in one case seems equally applicable to the other.

Rules for connecting service.

It may perhaps therefore be laid down in general, that services will connect in all cases of distinct contracts, so as to satisfy the statutes where the following rules are observed.

1. Service must be uninterrupted, &c.

First, the service must constitute one entire unbroken year's service. Any interruption, though but for a single day, during which the servant is legally exempt from his

(1) Ante, 378.
(2) 5 Term Rep. 98. post, 414.
(3) See also the observations of Buller, J. in Rex *v.* Alton, as reported, 2 Bott, 222. Pl. 265. ante, 370.

master's

master's controul, will defeat it. As where a person five days after Michaelmas was hired from thence to the Michaelmas following, on which day *he departed* from his master's service, and was paid his wages to that time. *On the day after* his departure he returned, and covenanted with his said master to serve him for another year, and lived with him for eleven months.—*Per* Powis, judge of assize. The services will not connect so as to give a settlement; there is no hiring for a year, *nor service for a year pursuant to the hiring* (1). So a person hired for a year served till within three weeks of the end of it, when with his own consent he was discharged by his master, on some dispute between them. He was absent a fortnight, and then went into the service again, at the request of his mistress, his master being from home. Whilst there, and within a week after the expiration of the first year, his master hired him for another year, of which he served six months. The services are not continued as is required by the statute, for there is a chasm of a fortnight between them, during which the servant was discharged from his master's service. (2)

Fraction of a day, no interruption.

But where the first service terminates, and a new contract is made upon the same day, as the law makes no fraction of a day, unless in some special cases, and the servant is under his master's controul by the original agreement for the whole of that time, a departure from service during that day has been held not to amount to such a discontinuance as will disconnect the services. It is only a pause to enable the servant to consider whether he will absolutely quit the service or not (3). Thus, a servant was hired, and lived with his master for three

(1) Wichford *v.* Bretford, Fort. 311. But the opinion as there expressed seems to go against the connection of services under different contracts in all cases.

(2) Rex *v.* Caverswall, Burr. S. C. 461, ante, 371.

(3) Per Lord Kenyon, C. J. in Rex *v.* Grantham, 3 Term Rep. 754.

quarters of a year to Lady-day. On that day he received his wages and left the service. He then went to his father's house, not having had any discourse with his master about continuing in the service. When he had been about an hour with his father, the latter advised him to go to his master, and see if he could not agree with him for a year. He accordingly went thereupon, and agreed for another year, served half of it, and was then turned away. It was held that he gained a settlement; for there was a yearly hiring, and a complete year's service. It was not discontinued. The servant was a little doubtful about a new contract; he went to consult his father, and in an hour's time returned and made one. "Upon "every new contract there is a sort of discontinuance. "This last day of the former contract is the first day of "the second service; and this was only an hour's ab- "sence within the space of that same day; therefore he "remained a servant during the whole time of the com- "pletion of this year." (1)

Fraction of a day no discontinuance.

The same point was subsequently determined in another case. On the last day of his year the servant received his wages, took his clothes, and left his master's house and service. His master came to him half an hour afterwards, and desired him to stay with him, but the pauper required a sum for his wages, which the master refused, saying, *he should see him presently at the fair*. At one o'clock the same day he made an agreement with the master at the fair, and served three months, which was held to connect with his prior service, and make up his year. The only difference between these cases is, that in the last, the pauper made a new contract, and obtained an increase of wages. But there is no abandonment nor discontinuance of the service; the law will not make a fraction of a day. (2)

(1) Rex *v.* Fifehead Magdalen, Burr. S. C. 116.

(2) Rex *v.* Ellisfield, Cald. 4.

In

In these instances the contracts under which the service was performed were express. But it does not make any difference if the minor contract exists by implication, or is made conditionally, since service for a year under such hirings would have been sufficient.

Connecting services under implied contracts.

The pauper was hired from November till Michaelmas, at six pounds ten shillings, and two or three days before the expiration of his time, his master offered him the same wages for the year ensuing, which the pauper did not think sufficient. On Michaelmas-day they had agreed for wages, all but the expence of washing. The servant had no intention of leaving his master, and he believed his master had no intention of parting with him. He continued in his master's house, and did what was to be done as usual; neither removing his clothes, nor offering himself to any other master; nor did the latter seek another servant. He considered himself at liberty to have left his master if any better hiring had offered. On the second day after Michaelmas-day he agreed to his master's terms, and served him for some months, amounting to more than sufficient to make up a year, if this service could connect with that under his former agreement. It was held to do so; for during the time between the first contract and the hiring for a year on the second day after Michaelmas, the servant continued in the same capacity, and did his work as usual. The law therefore implied that he continued under the former agreement, and was entitled to receive wages in the same proportion. (1)

Service under an implied hiring.

This case may be supported upon another principle, viz. that on Michaelmas-day every thing was agreed upon, except the expence of washing; and as the servant continued in the service, the agreement in fact took place on

(1) Rex *v.* Sulgrave, 1 Term Rep. 778. See also Rex *v.* Croscombe, Burr. S. C. 256, post.

Michaelmas-day, but subject to a condition by which it might be defeated; namely, if the parties could not agree as to the washing.

II. The servant must be under the master's control, &c.

The second requisite is, that the master shall have the same degree of control and authority over his servant during the entire year under all the contracts, as would be necessary to give a settlement where the service is performed under one yearly hiring.

Must contain no exemption.

They must contain no special exemption from labour either of days or hours, and be subject to the same rules precisely as regulate the contract for a year's service under the statute of 3 & 4 W. III. (1)

Weekly hiring to burl cloth.

A girl was hired under a weekly agreement at weekly wages to burl cloth, and when paid her wages every week on Saturday, was told "that she should come the week "following;" which she did accordingly, *and renewed the contract* for the week ensuing. Here the servant was not under her master's control from Saturday night until Monday morning, and therefore did not gain a settlement by her service. (2)

But where the pauper hired himself by the week, and nothing was said about Sunday in the contract, but he worked on that day occasionally, when asked by his master, without receiving any additional wages, only sometimes victuals. He received his wages weekly, and lodged and boarded himself. Having served thus for nine months, he was hired by his master for a year, as a family servant, and served eleven months. It was held that these services did connect so as to confer a settlement; because nothing being said about Sunday in the hiring by the week,

(1) Ante, 335, et seq. (2) Rex *v.* Wrington, Burr. S. C. 280.

it is to be inferred that it is included as part of the week, for a hiring by the week must mean the whole week: the servant was under his master's control therefore during the whole of the week, under each weekly hiring, just as much as he was under that for a year. But it was taken for granted, as beyond doubt, that if he had not been so, the services would not have connected. (1)

These two rules are nothing more than an application to successive hirings of the principle so often referred to, as prevailing universally where the service is under one yearly hiring; namely, that when the contract is discontinued, and "the master has parted with all his authority, an interruption in the service incurably destroys "the settlement."

Both species of service are subject therefore to the same rules. If the parties agree that there shall be a chasm in the service, and provide for it by an exception in any of the contracts, it defeats the settlement (2). If no such exception is made, but an interval intervene in fact, even from Saturday night to Monday morning (as in the case of burling cloth), it equally destroys it. For this is no more than the common case of absence after a dissolution, where an intention to recommence the relation at a future period avails nothing. (3)

But absence during the continuance of any minor hiring may be cured in the same manner, and upon the same principles, that apply to cases of dispensation under one yearly hiring.

(1) Rex *v.* Sutton, 1 East, 656. Another point was, that the services not being ejusdem generis could not be joined. But the court held that his being first an out door and then a family servant made no difference in his services so as to prevent it, ante, 401.

(2) See ante, 335.

(3) Ante, 408. n. (2).

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III. Must be unmarried, &c.

The third rule necessary to render services connectable, does not apply to cases where the yearly contract and service are simultaneous. In this latter case, if the servant's marriage takes place after an agreement of hiring has been entered into, a settlement is not thereby prevented (1). But it has been held, that the servant must be unmarried at the commencement of that yearly hiring, by which he claims a settlement, as well where the contract is implied, in consequence of service protracted to a second year, as where it is made in express terms.

Marriage before second yearly hiring.

The pauper went into service under a general hiring, in the parish of St. Mary, and served there seven months when he married his present wife. After his marriage he remained in his master's service, in the said parish, four months, when he took lodgings in the parish of St. Giles, and removed thither with his wife, where he slept for seven months, and continued to serve his master without coming to any new hiring. Having served for eighteen months in the whole, he left the service. It was held by the judges, after taking time to consider, that he gained no settlement in St. Giles's, where he resided the last seven months.

For 3 W. & M. c. 11. and 8 & 9 W. III. c. 3. require that the servant shall be unmarried, and without children at the time of hiring into the parish. There was no residence for forty days in St. Giles's, under the first hiring, but only for a month. If there had been a residence for forty days, the pauper would have been well settled there at the end of the first year. But there was an implied contract of service for the second year, under which he resided in that parish for the last six months of his service. If one had been expressly made at the commencement of the second year, he could not gain a settlement under it, as he was married when he made it;

(1) Ante, 301. et seq.

and

and he cannot by an implied contract do that which in express and direct terms he could not do. (1)

This determination related only to the condition of the servant when hired for the year: but in a subsequent case it is laid down as a general rule, that, "in order to "gain a settlement by hiring and service, there must "be an hiring for a year, and a service for a year, and "the service for the last forty days must be performed "under a contract of hiring entered into when the pau-"per was unmarried."

Servant marries between first and second hiring.

A man being unmarried, was hired for a year, as a servant in husbandry, to live in the house. Two months afterwards he married, and at the end of six months service, put an end to his original contract by coming to a new agreement with his master for a year from that time, thereby agreeing to live out of the house. He removed under this last hiring to another farm, which his master had *in the same township*, and lived there for two years with his master, and was held not to acquire a settlement. (2)

Here was a hiring for a year, the person unmarried at the time, service for a year, and marriage during its continuance. If the original contract had continued, the servant would have gained a settlement, notwithstanding the intermarriage. This is admitted in argument by all the judges, and expressly relied upon by Lord Kenyon, C. J. who differed from the rest of the court, upon the ground that the first contract was not dissolved. If the reasoning used in the antecedent part of this section be just, it is equally clear that the mere act of dissolving the first agreement by consent, would not prevent the settle-

(1) Rex *v.* St. Giles, Cald. 54.

(2) Rex *v.* Great Chilton, 5 Term Rep. 672. See Rex *v.* Overnorton, 15 East, 347., where the point arose, but the case went off upon another ground.

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ment, for there was an hiring for a year, service under it for six months, and uninterrupted service for much more than the remainder of a year under a new contract (1). The only ground then of the determination is, the circumstance of marriage relied upon by two of the learned judges in delivering their opinions (2). Mr. J. Ashhurst states in general terms, "that if the second be a contract "distinct from the former one, the services under the "two cannot be coupled, for the purpose of giving the "pauper a settlement, because at the time of entering "into the second he was married."

Mr J. Lawrence, confining his opinion to what was required by the case before him, declared, "that the ser- "for the last forty days must be performed under a con- "tract of hiring entered into when the pauper was un- "married." (3)

Observations on Rex *v.* St. Giles, and Rex *v.* Great Chilton.

The first of these two cases, if literally considered, goes only to determine, that marriage previous to the yearly hiring, under which a settlement is sought, will prevent a servant from gaining it; and the last, that if he is married at the time of the hiring, whether yearly or otherwise, under which he serves the last forty days, he cannot acquire one.—But a servant may complete a year's service under more contracts than two, and may (at least in possibility) marry after entering into the first, and get quit of the disability previous to that hiring under which his final residence of forty days takes place. Thus, in the last case, if the pauper's wife had died a month or two after he had made his second agreement, and he had then entered into a new one, and served a sufficient time to complete his year, his settlement would not be ex-

(1) Ante, 401.

(2) Lord Kenyon seems to admit in his argument, that if the first contract was put an end to by entering into the new agreement, the pauper could not gain a settlement, because he was married when he made it.

(3) Ante, 411.

pressly

pressly decided by these authorities; for he was unmarried at the time of his yearly hiring, which satisfied the first, and also when he made the contract under which he resided the last forty days, which is all that is required by the second.

The opinion of Mr. J. Ashhurst however is express; that "marriage in all cases prevents an union between "services performed under contracts antecedent and sub-"sequent thereto."

Rex *v.* Great Chilton decides, that the servant must be exempt from statutory disability, not only at the time when he is hired for a year, but also when he enters into that agreement under which he completes his year's service; there seems no principle therefore which warrants a less general rule, than what is laid down by the learned judge; namely, that *the servant must be unmarried, and (upon the same ground) without unemancipated children, not only at the commencement of the first, but of every succeeding contract, under which that year's service is performed, through which* he seeks to gain a settlement.

What service is necessary under a yearly hiring to connect with minor hirings.

The next question is, whether any, and what service must be performed under the yearly hiring, for the purpose of connecting it with service under agreements to serve for a shorter period? It appears at one time to have been a received opinion, that there must be a service of forty days under the yearly hiring, because residence for so long was necessary, to gain a settlement under 3 W. & M. c. 4.; and the 8 & 9 W. III. was not intended to reduce the time of residence required by that statute, but to increase the service. According to one report, Lord C. J. Parker was of that opinion, as he lays it down, that if "a servant during a whole year is "hired from week to week, then is hired for a year and "serves one week; this is no settlement, for want of "a con-

" a continuance in the service forty days after the second " hiring. (1)

But this doctrine seems overruled; it being determined in a recent case by the two judges then upon the bench, that service for forty days under the yearly hiring is not necessary, but that service under it for ten days, if coupled with antecedent services under former hirings, confers a settlement (2). Upon the authority and principle of this case, service for a day, under a yearly contract, will connect with prior services so as to satisfy the statute. But whether there must not be that day to connect them, is no where expressly decided.

It would be a strong case, if when there had been twelve hirings of a month each, and upon the last day of the last month, a contract to serve for a year, and no service under it, that the servant should thereby acquire a settlement. It would be a stronger case, although perhaps not distinguishable in principle, if an agreement for a year's service should confer a settlement by reason of a distinct year of connected service performed in the same parish, under several hirings at any interval of time, however great. The reasons given in the books for separating the service from the hiring, is satisfied in this supposed case, as well as where part of the service is performed under the yearly agreement. The words of the statute are complied with; for there is an hiring for a year, and service for a year. The parish has had a year's service, which is the consideration of the settlement, and the pauper (except in cases of fraud) has found a parishioner who considers him a person of sufficient credit to be hired for a year. (3)

(1) Rex *v.* Brightwell, 10 Mod. 287. See also the reasoning of the court in Eardisland *v.* Leominster, 2 Bott, 253. Pl. 300.

(2) Rex *v.* Adson, 5 Term Rep. 98. The judges, Lord Kenyon and Grose, differed at first in opinion, but agreed, after taking time to consider.

(3) Ante.

On the other hand there is no foreseeing the consequences of such a decision, and possibly the contract being completely executory, and never entered upon, would be considered as not being of that species of lawful hiring *into* a parish which the statute requires; perhaps likewise analogy to a recent judicial determination that a residence for forty days, to confer a settlement, must be within a year's compass (1), may warrant the conclusion that the service under different hirings must also connect within the same period, and consequently that there must be at least one day's service under the year's hiring.

But at all events, constructive service under these minor hirings seems sufficient (2); upon the same principles that it is held to satisfy the statute where there has been a single hiring. (3) Constructive service sufficient.

SECT. IV. PART III.

Of Service with Different Masters.

SERVICE performed with different masters is an abiding in the same service, and confers a settlement where the contract continues unaltered in other respects. Service with different masters.

A servant hired for a year, served about half of it, when his master died. The executor asked him, if he was willing to serve him for the remainder of the year, *according to the bargain made between the testator and him.* The pauper assented, and served him in another parish, where the executor lived during the remainder of the year, when he received his wages. It was held that he gained a settlement in the executor's parish.—For the act of parliament does not require the service to be the Service with an executor.

(1) Rex v. Denham, Hil. 53 Geo. 3. 1 Maule and Selw. 221.

(2) See Rex v. Wintersett, ante, 316.

(3) Rex v. Grendon Underwood, ante, 402.

same

same as to place or person, but only a continuance of *the same service*. This is a continuance of the same service and not a new contract; the contract was not dissolved by the master's death. The servant was obliged to serve the executor, and the executor to pay him. (1)

A master dying three weeks after the servant's year commenced, he continued to serve the remainder with the widow and her sons, by whom the farm was continued on, and gained a settlement thereby. (2)

Service with the assignee of a farm.

So where the pauper being hired as a shepherd to one Knight, for a year from Michaelmas, continued in his service till Lady-day, when Knight paid him half a year's wages, and left the farm to one Smith, who entered, and took all the stock and servants. In harvest time Smith took the pauper off from keeping sheep, at which he continued since Knight's departure, and set him to harvest-work, for which he paid him five shillings extraordinary, and at the year's end paid him the other half-year's wages. Knight, when he left the farm, never told the pauper that he was no more his servant; nor was there any transactions between them towards dissolving the contract. Neither did Smith ever make any new contract for the last half year. It was held that this was a continuance in the *same service*. The original contract with Knight continued, and the service to Smith shall be taken to be a service to Knight; for the servant had never given his consent to change his master, and it could not be done without it, and he had a right to look to Knight for payment of his wages. It resembles the case where a master lends his servant to a neighbour for a week or longer, and he does such work as the neigh-

(1) Rex *v.* Ladock, Burr. S.C. 149.

(2) Rex *v.* Hardhorn, 12 East, 51. But the point argued was whether he being turned away three weeks before the expiration of his year was a dispensation or dissolution of the contract, ante, 363.

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bour sets him about, he is still in the original master's service. Knight's paying him the five shillings in harvest time makes no difference, any more than if the neighbour in the case supposed had given the servant a gratuity for his trouble. (1)

Service with other masters by consent of the first.

So where a servant hired at yearly wages to a blacksmith to be paid from time to time as he wanted, served his master for the year, except that with his master's consent he worked for a week with one person as a journeyman blacksmith, and for a fortnight with another, and in a fishing-boat at different times, for a space not exceeding three days altogether. These persons paid the servant for the time he worked with them, it being agreed between him and his master at the time of his absence, that he should have all he earned, and the master to deduct a sum out of his wages in the proportion of the time of his absence to that of the whole year, which was done accordingly. Upon these facts it was adjudged that the service was sufficient to confer a settlement. For it is not necessary that the service should be with the same person, it is sufficient if it be with a successor in the farm or an assignee. It is only a licence of departure for a certain time; the contract remains; and service by the master's consent with another person is service with the master. (2)

But to constitute *the same service* when the master is changed, the original contract must remain. If that is dissolved, service with a new master under a new contract, though entered into before the expiration of the original year with the first master's consent, who pays the year's wages, is not the same service, nor will it

(1) Rex *v.* Ivinghoe, 1 Stra. 90.

(2) Rex *v.* Beccles, Burr. S. C. 230. ante, 353.

connect with that performed under the original hiring so as to confer a settlement. (1)

Some of these cases are mere instances of dispensation with service, and others, of a peculiar direction of the service by the first and only master, and are considered as such in a former section of this chapter (2). They are classed together here, only in compliance with a distinction usually taken. Some of them are hardly cases of constructive service, since the labour done for another by the master's direction, is actual service done for the master himself. None of them are so strong as some dispensations which have been implied from a return to the service after absence without leave.

In some of these latter cases, the servant left the service without his master's knowledge, and worked wherever and with whomsoever he pleased, intending to abandon the relation altogether; but in the instances mentioned here, excepting that of the executor, the master allowed of the absence, and permitted the subordinate hiring, so that the parties acknowledged the continuance of the original contract by the very means which they took to dispense with its being literally fulfilled. (3)

SECT. V.

Of the Residence by, and Place in which, a Settlement is gained.

13 & 14 Car. II. c. 12.

THE 13 & 14 Car. II. chap. 12. requires a residence of forty days in the capacity of a servant in order to gain a settlement.

(1) Rex *v.* Thistleton, ante, 374.
(2) See ante, 350. et seq.
(3) See ante, 350. et seq.

3 W. III. chap. 11. and 8 & 9 W. III. chap. 30. make no alteration in this particular, but superadd the requisites of an hiring and service for a year. The provisions made by the acts of William have been already considered. Those which are connected with the servant's residence remain to be inquired into. They are three: 3 W. III. c. 11. & 9 W. III. c. 30.

1st. The residence must be in a parish or township having overseers. 2d. The servant must reside forty days in that place where the settlement is claimed. 3d. He must remain under the obligation of his yearly contract during some part of such residence. To these general qualifications may be added, 4th. The enumeration of some particular disabilities which prevent a settlement in certain situations. The residence.

1. The laws which provide for the maintenance and removal of the indigent poor, extend only to parishes and townships for which overseers are appointed (1). No settlement therefore can be gained either by residence as a servant, or in any other capacity in extraparochial places where there are no overseers. (2) I. In what place.

The 3 W. & M. c. 11. declares, "that the servant "shall be lawfully hired into any parish or town for one "year." This may seem to imply, that he should be hired for the purpose of serving a master who resides in such parish or town. But it has been held, that the words "parish or town" are only put for example, and that a settlement may be gained under a contract of hiring made in an extraparochial place, by serving where a settlement can be acquired (3); and the law is the same if the hiring take place in some other country. (4)

(1) Ante, chap. 2. p. 7. et seq.

(2) Clerkenwell *v.* Bridewell, Ld. Raym. 549. Rex *v.* St. Andrews, Holborn, Cald. 403.

(3) Rex *v.* St. Peter's, Oxford, Fol. 193.

(4) As, if a man be hired in Ireland for a year, and afterwards come within the year, and live in England the last forty days with his master, that is sufficient to gain a settlement. Per Eyre, J. Rex *v.* St. Peter's in Oxford, ante, n. (3).

II. The sort of residence.

The forty days' residence required by the second rule is to be considered in a two-fold view. 1st. The time, place, and nature of the residence. 2d. The situation and condition under which the servant resides.

I. Place and time of residence.

As to the time and place of residence—He may either reside in one parish or township during his entire servitude, or in several. If he reside in different places, he may inhabit, partly where a settlement is to be acquired, and partly where it can not.

The residence also may be either during forty running days, or for the same period at different intervals.

It is evident from the observations already made upon the 13 & 14 Car. II. and 8 & 9 W. III. that a servant gains a right of settlement by residence in a parish or township for the first forty days of his service, provided he is hired for a year, and serves that period. This right is only inchoate until the entire conditions imposed by these statutes are fulfilled, and when that is done, it becomes complete.

Place of residence.

As a residence for forty days therefore confers a settlement under such conditions, it follows that if a servant reside for distinct periods of forty days in different parishes, his settlement floats during the continuance of his year, and is determined by the last residence of forty days —For each residence for that period confers a settlement conditionally, and upon the principle already stated, that a latter settlement supersedes the former, it is the residence for the last forty days of the year's service which confers the settlement. (1)

(1) See Rex *v.* Ashton, 2 Const. 273. Pl. 334. and the reasoning of Lord Kenyon, C. J. Rex *v.* Brighthelmstone, 5 Term Rep. 188.

But it may happen that he resides during some part of the year's service where a settlement may be acquired, and for the remainder where it cannot. Thus if he serve forty days in parish A., and the rest of his year out of the kingdom, or in an extraparochial place, not having overseers, or if he does not reside forty days in any parish or place except A., he is settled in A.; for he has complied with all the statutory requisites: he has resided forty days under 13 & 14 Car. II.; he has been hired for a year under 3 W. III. and served for a year under 8 & 9 W. III., and the settlement in A. not being superseded by one gained subsequently during his service, he is settled there. (1)

The residence need not consist of successive days; it is sufficient if they amount to forty in the whole. (2)

Last forty days how reckoned.

From the determination of this difficulty a new one arises; namely, what shall be accounted the last forty days. For as the days of residence need not be connected, and as the servant may serve less than forty days at a time in one parish, and more than forty in another, and ultimately complete his residence of forty, by dwelling for a day or two in the first, it remains to determine in which of these parishes he is settled.

If the last forty days are reckoned, counting each day backward, or, as it is called, day by day, the settlement will be in one parish. But if the completion of a term of forty days be sufficient, then the place of residence for the last day is alone material, and the settlement will be determined by a different rule.

(1) Ante, 420. Rex *v.* St. Andrew's Holborn, Cald. 403. Rex *v.* St. Peter's in Oxford, Burr. S. C. 422.

(2) Greenwich *v.* Longdon, Burr. S. C. 243. But the 13 & 14 Car. II. c. 12. seems to have intended that the forty days should be successive.

Thus, if the servant reside twenty days in parish A., and afterwards ten in parish B., and then nineteen days in A., and thirty again in B., but return and spend the last night of his service in A., the settlement would be different according to these several modes of counting. If the last forty days are reckoned as they run backwards, it would be in B., the servant having resided the last forty out of the last sixty of his service there, and only twenty of that period in A. But if the forty days last completed confer the settlement, then he is settled in A., where he resided the last day.

The court determined, and not without some doubts, in favour of the latter mode of calculation, that wherever a settlement can be gained, the place of inhabitancy for the last day of the year's service settles the servant, provided he has resided there forty days in all during his year's service. (1)

Service in one place, residence in another.

But it some times happens that the servant may live in one parish, and his service be performed in another.

The statutes of William refer only to the parish or township in which the service is done, regarding it as the place of settlement. It must be owned that there seems some little anomaly in the law, which connects every other requisite for gaining this species of settlement with the parish in which the servant works, and yet makes the settlement depend upon the place where he sleeps. The reason seems to be, that the latter is where he inhabits; and inhabitancy, both in former statutes

(1) Lowess *v.* Lanstephan, Burr. S. C. 825. Rex *v.* Hulland, Dougl. 657. Rex *v.* Iveston, Cald. 288. 2 Bott. 291. Pl. 333. and see Ib. 292., notis: and the observations of Lord Kenyon, C. J. and Buller. J. Rex *v.* Brighthelmstone, 5 Term Rep. 188.

and

and in 13 & 14 Car. II. c. 12. is made the criterion of settlement.

To such a nicety has this rule been carried, that where a house stood in two parishes, and the master lay in parish A., where all the service was done, but the maid slept in parish B., she was held settled in B. (1)

Residence unknown to master.

Neither is the master's knowledge or consent to the servant's sleeping away from his house material. If the servant marry during service, and sleep with his wife in another parish, unknown to his master (2), he is settled there (3). And whether he sleeps there for successive nights or at intervals, his settlement is in the parish where he lodges the last night, if he has slept there forty in all (4). Upon the same principle, if he should sleep the last night in a parish where he had first served under his contract of hiring, and has resided there forty days during the entire service, he is settled there.

Servant's condition during residence.

As to the second consideration, namely, the servant's situation and condition during residence, it is in most cases immaterial. It is of no importance whether he dwell on land or water (5); or for what purpose the master comes into the parish, whether for a permanent residence, or a temporary sojournment. Thus, if the servant spend the last forty days of his service at a watering place, where his master went for the purpose of bathing (6), or at any

(1) Feversham *v.* Graveney, Fort. 221. If a man hath a house within two leets, he shall be taken to be conversant where his bed is. 2 Inst. 122.

(2) Rex *v.* Hedsor, Cald. 51. Rex *v.* Nympsfield, ib. 107.

(3) Ut in n. (1).

(4) Rex *v.* Great Bookham, Cald. 290. and the cases there cited.

(5) Rex *v.* Friendsbury, Burr. S. C. 644. Goring *v.* Moltsworth, 1 Barnard, K. B. 436. Cas. Set. & Rem. 412.

(6) Rex *v.* Bath Easton, Burr. S. C. 774.

other public place, where he is a temporary resident (1), sojourner, or visitor (2), he gains a settlement by inhabiting there.

Neither does it make any difference that the master has neither settlement (3), nor real property in the parish where his servant resides, and does not live there. Thus, a man hired to stay and look after horses at an inn where a stage-coach baited (4); a huntsman residing with his master's hounds (5); a warrener at a warren (6); a groom at a public place, exercising and training his master's running horses (7), were held to gain settlements in those parishes which they inhabited, although their respective masters neither resided, nor had houses, nor other local property there.

So also a residence with different masters, provided the service is sufficient in other respects, will confer a settlement (8). And these rules apply equally where the service is dispensed with. (9)

Residence in sickness gives no settlement.

The only distinction taken on the subject is, that if a servant live apart from his master, from disease and disability, he shall not be settled in the parish in which he dwells during illness, but in that where he resided for the last forty days of his effective service.

There is no express decision upon this point, but the judges have strongly inclined to it, upon the same principle, that a bastard born in a house of correction, or a

(1) Alton *v.* Elvetham, Burr. S. C. 418. 3 Burn's Just. Tit. Poor.

(2) Rex *v.* St. Peter's in Oxford, Fol. 193.

(3) Missenden *v.* Chesham, 2 Const. 178. Pl. 237.

(4) St. Peter's in Oxford *v.* Chipping Wycomb, 1 Stra. 528.

(5) Bishop's Hatfield *v.* St. Peter's, Fol. 197.

(6) Rex *v.* Eldersley, 2 Const. 274. Pl. 315.

(7) Rex *v.* East Ilsley, Burr. S. C. 722.

(8) Rex *v.* Ladock, Burr. S. C. 179.

(9) Rex *v.* Undermilbeck, 5 Term Rep. 387.

gaol,

gaol, is settled, not where it is born, but in the mother's parish (1). Thus Lord Mansfield puts it as a clear case: "suppose a person in service has an accident upon the "road by breaking a leg, and he stays forty days in a "place, shall that be a settlement (2)?" And where a yearly servant was deprived of reason about two months before the expiration of his year, and was then taken home by his father into another parish, where he lived until the year expired. The majority of the court intimated a strong opinion, that he was settled in the parish where he had last lived with, and actually served his master, and not where he was kept as a lunatic for the last two months of his year's contract. (3)

Must reside under his yearly contract.

As the residence may be in different parishes by reason of a connected service under different contracts, the next question is, whether that circumstance makes any variation as to the settlement. A compliance with the several statutory qualifications is required in every parish into which the servant removes. It is sufficiently obvious, that if there is no more than one contract and one year's service, they are complied with in each parish in which there is a residence of forty days. But where there are more contracts than one, whether express or implied, and the servant removes into a new parish subsequent to a new agreement, it varies the case. A contract for a year's service must exist there, and must be connected with the year's service, the 3 W. & M. c. 11. s. 6. ex-

(1) Ante, 290.

(2) Alton *v.* Elvetham, ante, 424. n. (1). Rex *v.* St. James in Bury St. Edmunds, 12 East, 25. Rex *v.* Thatcham, Ibid. Index.

(3) Rex *v.* Sutton, 5 Term Rep. 657. See Rex *v.* Sharrington, Cald. 471. where the point was not taken So an apprentice was held not to gain a settlement by inhabitancy during sickness. Rex *v.* Titchfield, Burr. S. C. 511. et post. and the 26 Res. of Judges 1633. Dalt. 23. ante, 242. supports this construction. See the cases cited on this subject, post. chap. xxi. s. 5. But 13 & 14 Car. II. c. 12. s. 3. seems to take it for granted that a settlement might be gained by a sojourner falling sick or impotent.

pressly

pressly enacting that the person shall be hired into the parish or town for a year (1). Thus, if there has been an hiring for a year, and service under it in parish A., and at the expiration of the year's service, the master and servant remove into parish B. where the servant serves for a whole year under *express weekly* hirings, he gains no settlement in B., because there is no yearly hiring there, although there is an yearly service.

But where a servant was hired for a year, and having served it, continued to live with his master in the parish in which he was so hired for above a quarter of a year longer without coming to any new agreement, and then the master took a house in a different parish, to which the servant removed with the rest of the family, and lived under the first contract for six months more, and was paid the same wages in proportion to his time, it was held that he was settled in his second parish. (2)

For a second hiring was necessarily implied at the commencement of the second year, by virtue of which the pauper lived in the second parish; and although the service was not completed under it, yet as there was an hiring for a year in that parish, and continuance of the same service in another, the impediments created by the statutes of William were removed, and the pauper's residence for the last forty days determined his settlement upon 13 & 14 Car. II. as it would if these acts had never passed. (3)

It seems immaterial in this case whether a second hiring was implied in the first parish; because, although there was then but one contract during his residence in both

(1) See ante, 419.

(2) Rex *v.* Croscombe, Burr. S. C. 256. See also the opinion of Ashhurst, J. Rex *v.* Sulgrave, 1 Term Rep. 778.

(3) It may be necessary to apprize the reader, that this is the author's inference from the case, and put partially collected from the reasons assigned for the judgment in the report.

parishes,

parishes (1), yet, as it was for more than a year, and accompanied the servant's person wherever he resided during its continuance, he lived in the second parish under a yearly hiring.

But although a contract cannot be considered as running into a new parish after it has expired, yet it has been already shewn, that service under an hiring in one parish will connect with service under a new yearly contract in another, and confer a settlement if there is a year's service complete, and a residence of forty days (2). For the principle of connecting service has no reference to the duration of prior or subsequent contracts, but to the contiguity of service, and the absolute control of the master.

Settlement may be gained in A., but not in B., under the same yearly hiring.

It follows from these positions, that a servant may gain a settlement under a hiring and service in one parish, who cannot do so by service with the same master if he removes into another, and lives under a different yearly hiring. For he may labour under incapacities at the time of the second hiring, from which he was exempted during the first. Thus, if a servant be unmarried at the time he is hired for a year, he acquires a settlement by service, and forty days' residence under that year's hiring, in every parish into which he removes, although he marries immediately afterwards (3). But if he marry during his first yearly contract, and then make one for a new year, he cannot gain a settlement in a new parish by subsequent service under the last agreement, by reason of his disability when it was made. (4)

It should seem further (although the point has never come directly before the court), that he might acquire a

(1) The case found that the servant continued to live with his master under the first contract.

(2) Ante, 399.; and Rex *v.* Crosscombe, ante, 426.

(3) Farringdon *v.* Witty, Salk. 527. 2 Bott. 301. Pl. 339., ante, 301.; and the cases cited, n. (1).

(4) Rex *v.* St. Giles, Reading, Cald. 54.

settlement

settlement in the first parish by service in the second, under this latter contract, although he could not acquire one in the second. Thus, suppose him unmarried, and hired for a year in parish A.; at the end of six months he marries; then dissolves his original contract with his master's consent, and enters into a new one for a year, but does not interrupt the service. He forthwith removes to parish B. and continues to live there with his master for more than a year. He gains no settlement in B. (1); but he seems to have obtained one in A. For there was an hiring for a year while unmarried, with residence forty days in A. and a year's service complete. This service of the last six months in a parish where he could not gain settlement, is like serving in an extraparochial place which does not defeat the inchoate right of settlement (2), none being subsequently gained by which it can be annulled.

Of residence under disabilities.

It having been determined also in Rex *v.* Adson (3), that the forty days' residence need not be within the year's hiring, it seems as if a settlement may be gained in the new parish, if a yearly contract subsists there for a single day, and the servant reside forty days under a contract entered into when exempted from statutory disqualifications, provided it is sufficient for the purpose in other respects. Thus, if he serve his whole year but one day in A. and serve that one, and thirty-nine more in B., under an express hiring for three months, he seems settled in B. For a contract for a year's service subsists while he serves there, and the period of service under it is immaterial; there is connected service for a year, and residence of forty days under a contract made, while he labours under none of the disqualifications created by 3 W. III. and 8 & 9 W. III. It is this last circumstance which distin-

(1) Rex *v.* Great Chilton, 5 Term Rep. 672.

(2) Rex *v.* St. Andrew's Holborn, 2 Bott. 292. Pl. 334. Ante, 419. n. (4); and the cases there cited.

(3) 5 Term Rep. 98. Ante, 414.

guishes

guishes this supposed case from Rex *v.* St. Giles (1), and the latter from Rex *v.* Adson (2). In Rex *v.* St. Giles, the pauper being an unmarried man, served under a general hiring in Sherborne for seven months, when he married, and continued there in his master's service for four months more; he then took lodgings in St. Giles's, removed there with his wife, and slept in the parish for seven months, during which time he continued to serve his master without coming to a new hiring, so that he served eighteen months in all; viz. eleven in Sherborne, and seven in St. Giles: the first month of the latter was under the old hiring, and the remaining six under a new one, implied from his continuance in the service. Mr. J. Willes, who delivered the judgment of the court, was of opinion that had he resided forty days in St. Giles, under the first hiring, he would have been settled there; but having resided no more than thirty under it, and the remainder under a new hiring he gained none.

This decision seems only to be reconciled with that in Rex *v.* Adson upon the principle laid down as a necessary qualification in all cases of residence, by Mr. J. Lawrence, in Rex *v.* Great Chilton, that service for the last forty days must be performed under a contract of hiring, entered into when the pauper was exempt from those disabilities which are created by statute. (3)

Upon the whole, therefore, it may be concluded, that a yearly hiring must either be originally entered into, or at least exist in the particular parish to confer a settlement and that there must be a year's service connected with this hiring.

But the further point was still left undetermined by these decisions, of how far interrupted residence of less than

Of residence 40 interrupted days,

(1) Ante, 411. n. (1). (2) Ante, 428. n. 3. (3) Ante, 412.

under distinct yearly hirings.

than forty days under distinct hirings for a year and occurring at a greater interval than a year, could be connected? This has been recently determined in the following judgment.

Lord Ellenborough, C. J. "The question was upon the residence necessary to confer a settlement by hiring and service, whether it was necessary there should be 40 days' residence within the compass of a year; or whether if the service was for several years uninterruptedly, a residence of 40 days within these several years would be sufficient. The facts were these. The pauper was hired for a year to G. S. and served that year: at the expiration of which he was hired to him for another year and served half of it; and during that year and a half he was resident at Basingstoke for 40 days, but he did not reside in B. for 40 days either within the first year or within the half year, nor (as was admitted) within any one period of a year while he continued with S. The sessions were of opinion that this residence was not sufficient, and we think their opinion right. By stat. 13 & 14 Car. II. c. 12. s. 1. poor persons coming to settle in any parish if likely to be chargeable to the parish, may be removed within 40 days after they so come to settle as aforesaid; and it is under this act that 40 days residence is required. By stat. 1 Jac. II. c. 17. s. 3. the 40 days' continuance in a parish intended by the statute 13 & 14 Car. II. to make a settlement, shall be accounted from the delivery of notice in writing to one of the officers of the parish to which such poor person removes; which notice by stat. 3 & 4 W. & M. c. 11. s. 3. is to be read in church the next Lord's day, and registered in the book kept for the poor accounts. By the same stat. s. 7. If any unmarried person not having any child or children shall be lawfully hired into any parish or town for one year such service shall be adjudged a good settlement therein, though no such

such notice in writing be delivered and published as aforesaid," and by stat. 8 & 9 W. III. c. 30. s. 4. "No person so hired as aforesaid, shall be adjudged to have a good settlement in any such parish or township unless such person shall continue and abide in the same service during the space of one whole year." Upon these clauses settlements by hiring and service now stand. It has been decided, that so as there is a hiring for a year and service for a year, it is not necessary the whole of the service should be under the yearly hiring; but service not under a yearly hiring may be connected with service under a yearly hiring; and both services, if uninterrupted, may be taken into the account: but it has never been decided that residences beyond the compass of a year can be connected; and as the legislature by requiring an hiring for a year, and a continuance and abiding in the same service during the space of one whole year, seem to have contemplated something which was not to be complete in less than a year, but was to be complete within that period; we think we abide most closely by the words, and give effect to the most probable intention of the legislature, by holding that the whole residence must be within the compass of a single year. Suppose the same service to continue uninterruptedly for 20 years, and the servant to sleep twice in every of such 20 years at the same inn in travelling, and to be at that inn the last night of his service, would it be expedient and reasonable that an enquiry extending over so long a period of time at detached intervals, should be gone into for the purpose of ascertaining the settlement of a pauper? What notice could the officers of that parish have had that he was come to settle there? And yet there his settlement would be if we were to hold that residence for 40 days beyond the compass of a single year would do. We are therefore of opinion, that a settlement in B. in this case was not established." (1)

(1) Rex v. Denham, 1 Maule and Selw. 221.

IV. Of particular disabilities by statute.

Particular disabilities, which prevent the settlement of servants in certain situations, are created by the following statutes:

1. By 9 & 10 W. III. c. 11. Servants coming into a parish under a certificate shall gain no settlement there, unless they take the lease of a tenement of the value of ten pounds a year, or execute some annual office there.(1)

2. By 12 Ann. st. 1. c. 18. s. 2. Persons hired, and living with persons who reside in the parish under a certificate.(2)

3. By 33 Geo. III. c. 54. sect. 24. Servants to a member of a benefit society.(3)

4. By 13 Geo. II. chap. 29. sect. 7. No child, nurse, or servant received, maintained, educated, or employed within the Foundling Hospital, shall gain any settlement in the parish or place where such hospital is situate, by virtue of such their reception, continuance, hiring, or residence in such hospital.

5. By 9 Geo. III. c. 31. s. 8. No person who shall be admitted into the Magdalen Hospital as a penitent prostitute, or who shall be employed therein as an hired servant, shall, by reason of such admittance or service, gain a settlement in the parish in which the said hospital is, or shall be situate.

SECT. VI.

Of the Proofs necessary to support this Settlement.

To establish a settlement by hiring and service, it is necessary to prove. 1. An hiring for a year. 2. Service for a year. 3. Residence of forty days.

(1) Post. Vol. ii. chap. xxviii. part 2. (2) Ibid. (3) See Append.

Where

Where the agreement is in writing, it is generally necessary to produce the written instrument; but a copy or parol evidence of the contents may be given in evidence in two cases (1)—1st, Where the writing cannot be found. 2d, Where it is in the custody of the adverse party, who refuses to produce it after being served with a proper notice. Hiring how proved. Written.

Where the agreement is not in writing, evidence may be given of the actual terms of the contract, or it may be inferred from what passed at the time of hiring (2), or from the mere fact of service. Parol.

Thus, where the pauper proved "that her husband "was abroad beyond sea, and had been so for two years "past if alive; that to her knowledge he lived in the "capacity of an ostler with Mrs. L——, of the parish of "H—— (some years since deceased), about two years, "where she had seen him brew; *but whether there was* "*any agreement or hiring relating to such service was not* "*proved*;" but she had heard her husband say he was "settled in the parish of H." The court was of opinion that the sessions were right in drawing the conclusion, that the husband was settled in H.; for although the evidence of hiring was slight, there was nothing to contradict it. (3) Inferred from what circumstance?

So where the pauper was seen, and known to be in the service of C. as a servant in husbandry, and to act in that capacity for upwards of a year, it was held sufficient evi-

(1) Rex *v.* St. Sepulchre's, Cald. 547. This point will be discussed more fully in treating of the production of indentures of apprenticeship under that species of settlement.

(2) Ante, 307. 323.

(3) Rex *v.* Holy Trinity in Wareham, Cald. 141. Ante, 323. et seq.

dence to enable the sessions to draw the conclusion of his having been in fact hired for a year. (1)

Likewise where the pauper having served 9 years as a cotton-worker, under unstamped articles of agreement, continued to serve his master for 4 years longer, without coming to a new agreement; it was held to warrant the sessions in presuming from the fact of a service, for four years at wages, though not specified, that such service was under a hiring for a year, there being nothing to repel the presumption. (2)

Presumptive evidence.

This however is only presumptive evidence, and therefore liable to be rebutted by the peculiar circumstances of each particular case. (3)

Such presumption, however, is not destroyed by the servant having originally agreed for a period short of a year, if she afterwards live in the same service for a year, or more. As where a female servant was at first only hired from March till Michaelmas following, but continued in the same service for three years, it was deemed sufficient evidence to warrant the justices in finding a hiring for a year. (4)

So where the pauper, a fortnight after old Michaelmas

(1) Rex *v.* Lyth, 5 Term Rep. 327. Lord Kenyon laid some stress on this being the case of a servant in husbandry; but the subsequent decisions here referred to, respect female servants.

(2) Rex *v.* Pendleton, 15 East, 449. ante.

(3) Ut in n. (1).

(4) Rex *v.* Long Whatton, 5 Term Rep. 447. In this case there was no evidence to prove the original hiring to have been for less than a year, except the pauper's declaration to third persons, she being insane at the hearing of the appeal. But Lord Kenyon observed that, independent of the pauper's declarations, the evidence was sufficient to warrant the inference of a hiring for a year, for though the pauper was at first only hired till the Michaelmas following, yet she continued in the same service for three years.

1792, heard from Miss G—— that her father wanted a servant, and agreed with her to go a month upon liking; she went accordingly, and in the spring following, Miss G—— told her, that if she behaved well, and did her work properly, she should have four pounds for a year. The pauper continued in Miss G——'s service, *without any other agreement*, until Christmas following, when she quitted it. About a fortnight after Michaelmas 1793, she received four pounds for a year's wages then due, and for the remainder of the service from that time, eighteen pence a week, being the proportion of wages then due at the rate of four pounds *per annum*. Lord Kenyon, C. J. "At present the case is so imperfectly stated, that we cannot give any judgment upon it. A retrospective hiring certainly is not sufficient to confer a settlement; but as the pauper *continued* in the same service after the expiration of the first year, there was abundant ground for the justices to have presumed a hiring for a year from that time." (1)

It seems in this case as if service, although for less than a year, might, under particular circumstances, be held sufficient evidence of a yearly contract. It does not appear whether the presumption was considered as helped by the antecedent service under a retrospective hiring (2). But the conclusion is evidently more strong in cases where there has been a prior service, and hiring for a year (3), and it is not affected by the servant's quitting his place during the year. (4)

(1) Rex *v.* Hales, 5 Term Rep. 668. Ante, 325. n. (2).

(2) The declaration that the servant "should have four pounds for a year" seems to imply a yearly hiring, or at least to help the inference considerably.

(3) Rex *v.* Croscombe, Burr. S. C. 256. Ante, 342.

(4) Rex *v.* Hales, ut supra. Ante, 325. n. (1).

Year's service inferred.

Where service for an entire year cannot be directly proved, it seems fair matter of inference from evidence of a yearly hiring, and service done under it, although the witness's recollection does not enable him to point out its precise duration.

Residence.

Residence of forty days may likewise be inferred from the fact of service.

All matters which go to avoid a settlement are properly the party's evidence who seeks to impeach it, and constitute his case.

But the facts necessary to establish or overthrow this species of settlement are seldom left to inference. The witnesses usually called are qualified to give direct testimony of the fact. Such are the pauper or his master; their wives and fellow servants; for all persons may be witnesses who are not affected by the following grounds of incompetency:

Witnesses who may be incompetent.

1. Imbecility.

1. Imbecility of understanding—Such are ideots and lunatics, while under the influence of their malady. (1)

2. Infidelity.

2. Want of religious belief—Such are children under fourteen, if unacquainted with the obligation of an oath (2). Infidels professing no religion that can bind their conscience (3). But pagans are not incompetent, if sworn according to the custom and manner of their country (4); nor any other persons who believe in God,

(1) See Bull, L. N. P. 293.

(2) Brazier's case, Bull. L. N. P. 293. See also the cases collected, 1 East. Cro. Law. 441. But this objection arises partly from the imbecility of the infant's understanding.

(3) Ib. 292. Co. Lit. 6. White's case, Leach's Crown cases, 337.

(4) Ormichund *v.* Barker, 1 Wils. 84. 1 Atk. 19. Fachina *v.* Sabine, 2 Str. 1104.

in

in the obligation of an oath, and in a future state of rewards and punishments. (1)

3. Persons convicted of an infamous crime; such as treason, felony without benefit of clergy (2), perjury, conspiracy, barratry, attaint of false verdict, &c. (3); and to render them incompetent, judgment must be entered, and exist at the time, and must be proved by producing a copy thereof, formally authenticated. (4) 3. Infamy.

On an appeal against the removal of a wife and children, the respondent, to prove the settlement, produced the husband in the gaoler's custody, who admitted that he had been convicted of grand larceny at the preceding great sessions at Cardigan, and that he had prayed the benefit of the statute, and was then suffering the punishment of 12 months' imprisonment. But the record of such conviction was not produced. The court of king's bench held that the record not being produced, he was an admissible witness. For his conviction can only be known by the record, and there is no authority for ad-

(1) Rex *v.* Taylor, Peake's Ni. Pri. Cas. 11.

(2) By 31 Geo. III. c. 35. No person shall be incompetent as a witness by reason of a conviction for petty larceny. When the felony is within clergy competency is restored by the burning in the hand; for it is a statute pardon, Rex *v.* Count de Castlemain, after consulting the judges of C. B; T. Raym. 379, 3 St. Tr. 36. 4 St. Tr. 393.; and see cases there cited. And now by 19 Geo. III. c. 74. if persons convicted of a clergyable offence be fined or whipped, their competency is restored.

(3) Pendock *v.* Mackinder, 2 Wils. 182.

(4) Lee *v.* Gansel, Cowp. 3. Wilkes *v.* Smallbrooke, 1 Sid. 51. (7). 2 Hawk. ch. 46. s. 20. 3 Com. Dig. Evidence, 280. 5 Com. Dig. Testmoigne, 516. Bull. L. N. P. 292. But quære whether the witness may not be asked, in order to discredit him although not to render him incompetent, whether he has not been convicted, and suffered the judgment of the law. A man appeared to bail one charged with grand larceny, the counsel who opposed the justification, was permitted to ask, whether he had not stood in the pillory for perjury, for it could not subject him to any punishment; and he, admitting the fact, was rejected. Rex *v.* Edwards, 4 Term Rep. 440. See also Rex *v.* Priddle, 2 Leach, Cr. Cas. 496.

mitting parol evidence of it. Per Lawrence, J. The books are uniform in requiring the production of a record to prove a witness convicted of an offence. (1)

But the objection may be removed by a pardon under the great seal (2), except in cases where incompetency is part of the punishment, as in convictions for perjury on 5 Eliz. c. 9. (3)

4. Relationship. The fourth general ground of incompetency is that of relationship; but as that extends to no case beyond the connection of husband and wife when interested in the suit, and as there are usually no other parties to questions of settlement but parishes or townships, this species of incompetence can seldom arise, unless where it involves the question of marriage, and then the wife shall not be admitted to give testimony that may even collaterally affect and criminate her husband (4); and this perhaps although a divorce has taken place. (5)

5. Interest. The fifth, and only remaining ground of incompetency, arises from a witness being either actually interested in the event of the suit in respect of a benefit or prejudice which is to arise *directly* from thence, or else from conceiving himself to be in that situation (6). This, in cases of settlement, is narrowed to being rated, or paying pa-

(1) Rex *v.* Castell Careinion, 8 East, 77.

(2) Rex *v.* Gully, Leach's Crown Cas. 115. Rex *v.* Reily, 2 Leach, Cr. Cas. 509.

(3) Rex *v.* Crosby, Salk. 289.

(4) Ante, 269. and the authorities cited in the notes.

(5) Of facts happening during the coverture, Semb. per Lord Alvanley. Monroe *v.* Twisleton, Peake's Law of Evid. App. 44.

(6) Per Lord Ellenborough, C. J. Howard *v.* Shipley, 4 East, 181. See also Fotheringham *v.* Greenwood, 1 Str. 129. But in the latter case an interest arising from an honorary and not a legal engagement, was held sufficient to render the witness incompetent. Likewise an anonymous case, cited by Cowper, arguendo. Rudd's case, 1 Leach Cr. Cas. 154. See also Rex *v.* Woburn, 10 East, 395.

rochial

rochial taxes in that parish or place by which the party is produced in evidence; for persons rated are interested as contributing to the maintenance of paupers settled in their parish, and also as liable to the costs of appeals respecting them. (1)

They cannot be witnesses if directly liable in the first instance, *as parties in the cause* for costs, although entitled to be reimbursed such costs out of the parochial fund (2). But upon appeal against an order of removal, where it was objected to the competency of a witness, that he was assessed to the parish rates, Lord Mansfield thought it a sufficient answer, that an agreement appeared between the landlord and tenant, that the former should indemnify the latter from the assessment, for the tenant had a right to deduct it out of his rent; therefore the sessions ought to have heard him. (3)

Parishioners when compellable to give evidence.

This objection however is confined to the case of persons actually rated or paying; parishioners are otherwise good witnesses, and may be compelled to give evidence, although liable to be included in future rates (4), and

(1) Rex *v.* Governors of St. Mary Magdalen, Bermondsey, 3 East, 7. Rex *v.* Little Lumley, 6 Term Rep. 468.

(2) Rex *v.* Governors of St. Mary Magdalen, Bermondsey, supra, (1).

(3) Rex *v.* Woodland, 3 East, 11. 1 Term Rep. 261.

(4) Rex *v.* Prosser, 4 Term Rep. 17. Semb. Rex *v.* Gisburn, 15 East, 57. Note the question of competency in this case, and those cited, supra, n. (1), arose upon Appeals against Poor Rates; but the principle applies equally to orders of removal, and was so decided, Rex *v.* South Lynn, 5 Term Rep. 664. Rex *v.* Kirdford, 2 East, 559. and see the case of a parishioner liable to a rate, held to be admissible in a question of boundary between the adjoining parishes. Deacon *v.* Cock, Taunton spring assiz. 1789. cor. Buller, J. Upon appeal against an order of removal, the appellant's township produced one of its inhabitants as a witness, who stated upon the *voirdire* that he occupied a cottage there of the annual value of 25 shillings, but that he was not rated to, nor paid any public rate or tax. Such answer must be taken to be true for the purpose, and it cannot be objected to his examination in chief, that the best evidence of the fact was not given by the production of the rate itself. Rex *v.* Gisburn, 15 East, 5.

omitted in the present one for the purpose of using their testimony in the particular case (1), unless their property is rated in the name of another who has no interest therein, for in that case whatever the person assessed paid towards the rate, must be allowed him again by the proposed witness as owner (2). The objection appears to have been considered as further restricted to cases where rated parishioners are produced by their own parish, for they are admissible if called by the opposite side, as being produced against their interest, and not being immediate parties to the record. (3)

46 Geo. III. c. 37. Can't be forced to give his evidence.

But he cannot be compelled to give evidence by the adverse parish against his own, notwithstanding the statute 46 Geo. III. c. 37. which declares, "that a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground, that the answering of such questions may establish, or tend to establish, that he owes a debt or is otherwise subject to a civil suit either at the instance of His Majesty or of any other person or persons." (4) Because though the parties appealing before the court are the churchwardens and overseers of the parish, which seems at first to afford an answer to the objection, that a rated inhabitant is not a party to the proceeding: yet in reality the appeal is by the officers "on behalf of the "inhabitants of the parish, who are all of them paying

(1) Rex *v.* Kirdford, 2 East, 559.

(2) Rex *v.* Killerby, 10 East, 293.

(3) Ashburton *v.* Woodland, 1 Term Rep. 261. Semb. per Bayley, J. Rex *v.* Hardwicke, 11 East, 590.

(4) It was long ago decided in the case of an appeal, that a rated parishioner could be compelled to give evidence which might tend to charge his parish: Rex *v.* St. Lawrence Winchester, Burr. S. C. 588. and Cox *v.* Whalley, 20 Geo. III. cited in marg. and in Rex *v.* Woburn, 10 East, 399. But this point is overruled by the subsequent cases here stated. The act 46 Geo. III. c. 37. is declaratory; a majority of the judges having been of opinion, that a witness was compellable to answer such questions by the common law. Lord Melville's case.

"to

" to the rates, the parties grieved, and are all directly " and immediately interested in the event of the proceed- " ing, by which the maintenance of the pauper is to be " fixed on them, or removed from them, as well as the costs. " It is a long established rule of evidence, that a party " to the suit cannot be called upon against his will by " the opposite party to give evidence, and we think that " the late act of the 46th of the King does not break in " upon this rule. That act takes away the right of ob- " jecting by reason only, or on the sole ground, that the " answering the question may establish, or tend to estab- " lish that the witness owes a debt, or is otherwise sub- " ject to a civil suit. But that is not the ground of the " present objection; nor does it appear to us to have been " the intention of the legislature, by this act of parlia- " ment, to alter the situation of parties to a suit or pro- " ceeding; more especially in a proceeding such as the " present, where the situation of the person proposed to " be examined did not bring him within the words of the " act, nor the inconvenience intended to be remedied by " it." (1)

Declarations evidence.

It followed as a consequence from this determination, of his being quodamodo a party to the suit upon an appeal, that the declarations of such a parishioner, made at the time he was a rated inhabitant, may be given in evidence in a question of settlement against his parish. (2) And it is by no means necessary, in order to make such declarations evidence, that he should first be called as a witness and refuse to be examined. (3)

Interest arising during the trial.

Also when in an appeal between the parishes of M. & T. against an order of removal, evidence was given by the

(1) Rex *v.* Woburn, 10 East, 395.

(2) Rex *v.* Hardwicke, 11 East, 578. But unless the opposite party first offered to call such inhabitant as a witness, which was objected to, the magistrates should not in ordinary cases give any weight to more declarations of that kind; though there may be occasions where the declarations of such a party would have great weight. Per Bayley, J. Ibid. But see post. (3) also Hart *v.* Horn, 2 Camp. 492.

(3) Rex *v.* Whitley, Lower, Trin. 53 Geo. III. 1 Maule & Selw. MSS.

appel-

appellants to shew the pauper's settlement in R. a third parish, a rated inhabitant of R. could not be called to disprove that fact, and shew that no settlement was gained there. For the object of his evidence is to fix the pauper in T., which, when fixed, would conclude the question of his settlement as to all other parishes at that time, and he could not afterward be removed to R. in respect of any previous settlement. He is therefore directly interested, because his evidence is to relieve his own parish from the burthen of maintaining the pauper (1). But no person is bound to answer a question which may tend to criminate himself or subject him to a penalty. (2)

Pauper a witness, when master not.

It is evident from these rules that the pauper is in most cases a good witness as to the circumstances respecting his settlement (3); but his master in some may not.

Credit of witness how attacked and supported.

A witness, although competent, may be unworthy of credit, either from his general character, or having given a different account of the transaction previously, or from many other circumstances. Witnesses may be called to discredit him from general character, as if they will swear from the knowledge they have of him, that they would not believe him upon his oath. But they must not give evidence as to a particular fact, for the man cannot come prepared to justify it (4). A party may give general evidence to support the character of his own witness, but cannot produce it to discredit him, "for that would be "to enable him to destroy the witness if he spoke against "him, and to make him a good witness if he spoke for "him, with the means in his hands of destroying him if "he spoke against him." (5)

(1) Rex *v.* Terrington, 15 East, 471.

(2) Rex *v.* Portsea, Burr. S. C. 834.

(3) Per Ashurst, J. Rex *v.* Eriswell, 3 Term Rep. 720.

(4) Bull. L. N. P. 29.

(5) Hardwell *v.* Jarman, Taunton Spring assizes, 1789. cor. Buller, J. Hasting's Cas. per Lord Chancellor, 11 June, 1789. In Dom. Proc. 12 Mod. 375, Adams *v.* Arnold, Bull. L. N. P. 297.

"But

" But if a witness proves facts in a cause which makes " against the party who called him, yet the party may " call other witnesses to prove that those facts were other- " wise: for such facts are evidence in the cause, and the " other witnesses are not called directly to discredit the " first witness, but the impeachment of his credit is ac- " cidental and consequential only." (1)

Also a witness cannot be examined to any collateral independent fact which is irrelevant to the matter in issue, for the purpose of having him contradicted by another witness, in order to discredit the whole of his testimony. (2)

Pauper's examination on evidence.

A further question has been made, how far the pauper's examination respecting his place of settlement taken before a magistrate upon oath, or a declaration of his to the like effect, could be received in evidence, in the event of his death, insanity, or being beyond the reach of judicial process.

It seems to have been the ancient practice of most quarter sessions to admit these declarations as evidence; and the court of king's bench was formerly of opinion that they were rightly received, considering it as one of the excepted cases in which evidence upon hearsay might be given. (3)

These

(1) Bull. L. N. P. 297.

(2) Spenceley *v.* De Willot. 7 East, 108.

(3) Rex *v.* Nuttley, Burr. S. C. 701. Rex *v.* Greenwich, Burr. S. C. 243. Rex *v.* St. Michael's Bath, Ib. 731. Rex *v.* Creech St. Michael's, Ib. 761. Rex *v.* Holy Trinity in Wareham, Cald. 141. 2 Bott, 362. Pl. 390. Rex *v.* St. Sepulchre's, Cald. 547. Rex *v.* Bury, Cald. 482. I. H. while on his death bed, told his wife that she and her children would belong to and prove their settlement in the parish of R. Buller J. " No argument has been urged against receiving the declaration of the husband on his death-bed. From the awful situation in which the party speaks, such testimony is uniformly received, in criminal cases, and is consequently admissible here." Rex *v.* Bury, Cald. 486.

These points were afterwards elaborately discussed in the case of Rex *v.* Eriswell (1), when the judges were divided in opinion. It has however been subsequently determined, and must be now considered as settled law, that neither the *ex parte* examination of the pauper, taken in writing on oath before two magistrates, whether for the purpose of inquiring into his settlement (2), or of removing him (3), are admissible in evidence upon a question of settlement; and this, whether the pauper is insane (4), or has absconded (5), or is dead (6); and hearsay evidence of the pauper's declaration as to his settlement are equally inadmissible under any circumstances. (7)

Nor his declarations.

But examinations before two magistrates are made evidence of settlement by the mutiny act (8), and the original

Examination under Mutiny Act.

486. Such a declaration was admitted also in Appotens *v.* Dunswell. 2 Bott, 80. Pl. 116. and see Wright ex dem. Clymer *v.* Littler, 3 Burr. 1244. 1 Black. Rep. 345. S. C. Also a case cited by Lord Ellenborough, where Heath, J. admitted evidence, that the attesting witness had, in his dying moments, begged pardon of heaven for having been concerned in forging the bond. Aveson *v.* Lord Kinniard, 6 East, 195. But where a person speaks in the abstract to his settlement, his declaration goes to a question of law as well as a matter of fact.

(1) 3 Term Rep. 707.

(2) Rex *v.* Eriswell, ante, (1).

(3) Rex *v.* Nuneham Courtney, 1 East, 373, and the cases cited in the following notes.

(4) Rex *v.* Eriswell, ante, (1)

(5) Rex *v.* Nuneham Courtney, ante, (3).

(6) Rex *v.* Ferry Frystone, 2 East, 54. Rex *v.* Abergwilly, ib. 73.

(7) See the cases cited, ante, n. (2), (3), (5), (6). Rex *v.* Chadderton, 2 East, 27. wherein the declarations of a mother to her son, that she had been relieved by the parish of C. were held not to be admissible in evidence after the mother's death, Rex *v.* Erith, ante, 293. et seq.

(8) Sect. 33. enables two or more justices for the county, where any non-commissioned officer or soldier shall be quartered, in case such officer or soldier has either wife or child or children, to cause such officer or soldier to be summoned before them in the place where they are quartered, in order to make oath of the place of their last legal settlement; and such persons are directed to obey such summons, and to take oath accordingly. And such justices are thereby requested to

ginal examination has been held admissible in evidence as well as the attested copy (1); but no other attested copy is legal evidence while the original is in existence, except that given to the soldier (2), and when produced, they must be proved and authenticated in the same manner as other written instruments. (3)

Evidence of the master's declarations after his death, are equally inadmissible as to the pauper's having been hired as those of the pauper. (4)

to give an attested copy of such affidavit to the person making the same, to be by him delivered to his commanding officer, in order to be produced when required, which attested copy shall be at any time admitted in evidence as to such last legal settlement before any of his majesty's justices of the peace, or at any general quarter sessions of the peace; provided always that in case any such officer or soldier shall be again summoned to make oath as aforesaid, then on such attested copy of the oath by him formally taken, being produced by him, or by any other person on his behalf, such officer or soldier shall not be obliged to take any other or further oath with regard to his legal settlement, but shall have a copy of such attested copy of examination, if required.

(1) Rex *v.* Warley, 6 Term Rep. 534. Rex *v.* Bilton, 1 East, 13. But see Burdon *v.* Richets, 2 Camp. N. P. 121.

(2) Rex *v.* Clayton Le Moors, 5 Term Rep. 704.

(3) Rex *v.* Bilton, ante, n. (1).

(4) See Rex *v.* Lyth, 5 Term Rep. 247.

CHAPTER XXI.

Of Settlement by Apprenticeship.

SECT. I.

Division of the Subject and general Rules respecting it.

12 & 14 C. II. c. 12.

3 W. & M. c. 11.

NOTHING more was required to settle an apprentice, by 13 & 14 Car. II. c. 12. than a residence of forty days (1). The 3 Will. & Mar. c. 11. exempts him from the necessity created by different statutes, that he should give notice of his inhabitancy. It enacts, that "if any "person shall be bound an apprentice by indenture, and "inhabit in any town or parish, such binding and inhabi-"tation shall be adjudged a good settlement, though no "such notice in writing be delivered and published."

Apprentice need not be unmarried, &c.

An apprentice is not encumbered like an hired servant, with the condition, that he shall be unmarried (2), and without emancipated children when he makes the contract.

It is sufficient if he is *bound* as an apprentice, and inhabits the town or parish in that capacity.

Cannot gain settlement but as apprentice.

But as he is enabled to acquire a settlement by these means, he is fettered from gaining one in a capacity which is inconsistent with the relation he has covenanted to stand in towards his master.

(1) Ante, Chap. xvi. p. 252. et seq.

(2) Titchfield *v.* Milford, Burr. S. C. 511.

This

This is most clearly stated by Lord Kenyon, in what he considers as "axioms in this branch of settlement "law." His words are: "It is clear that, in general, "an apprentice is not capable of contracting the relation "of servant (or apprentice) to any other master, until "the end of the term for which he was bound. But it "is equally clear, that if the master and apprentice put "an end to the apprenticeship by mutual consent, it is "the same as if the indentures had never been executed, "and the latter may gain a settlement by hiring and ser- "vice (or under a new indenture of apprenticeship) (1) "with any other master, before the expiration of the "time which he was bound to serve as an apprentice. "Then there is a third case, that is where the apprentice "leaves his master and enters into the service of another, "if the indenture still subsist, he is not *sui juris*, but is "incapable of gaining a settlement by serving another "master, unless he serve with the consent of his former "master, and in such case he gains a settlement, not as "an hired servant, but as an apprentice." (2)

Rules apply to perfect apprenticeships.

These rules depend upon the incapacity to make a new contract while the indentures continue, and respect an apprentice regularly and effectively bound.

Rules as to defective contracts.

But although the parties intend a contract of apprenticeship, it will not enure as such if defective in substance or in form. Another rule is applicable therefore to persons in this situation, viz. That "where a contract "clearly appears to be intended as a contract of appren- "ticeship, and not as one of hiring and service as a ser- "vant, it shall not, if defective as a contract of appren- "ticeship, be converted into a contract of hiring and

(1) Rex v. Weddington, Burr. S. C. 766.

(2) Per Lord Kenyon, C. J. Rex v. Chipping Warden, 8 Term Rep. 108.

"service,

" service, so as to gain the party a settlement as a ser-
" vant." (1)

For all the statutes acknowledge a distinction between the condition of an apprentice and that of an hired servant, and the 3 W. & M. c. 11. regulates them by very different provisions. It is but reasonable, therefore, that " if the parties cannot avail themselves of the con-
" sequences of the condition in which they intended to
" stand, they shall not be put into another, in which they
" did not mean to place themselves." (2)

Division of subject.

The foregoing rules neither admit of modification nor exception, and this branch of settlement law may, with reference to them, be distributed under the following heads:

1st, The binding necessary to confer a settlement by apprenticeship. Under this head will be considered the distinction between defective contracts of apprenticeship and effective contracts of hiring and service.

2d, By what means indentures of apprenticeship are put an end to, so as to restore to the apprentice his capacity of entering into a fresh contract, under which a settlement can be acquired.

Further, as the party must inhabit the town or parish as an apprentice, what shall be considered as an abiding in that capacity; or in other words —

3d, Of the service necessary to confer the settlement.

4th, Of the residence by, and place in which a settlement is gained.

(1) Verba Le Blanc, J. Rex v. Laindon, 8 Term Rep. 379. Ante, 313. et seq.

(2) Verba Lord Kenyon, C. J. Ib.

SECT. II.

Of the binding necessary to gain a Settlement by Apprenticeship.

How bound.

APPRENTICES are bound, 1st, By voluntary consent, without the intervention of parish officers; and this is usually under 5 Eliz. chap. 4.

2d, By virtue of the power given to parish officers by 43 Eliz. chap. 3. in which case they are called parish apprentices.

Design of the statutes.

Neither statute was enacted with a view to settlements. The first was designed to regulate trade, and the latter, to instruct and maintain children actually settled and recognized as parochial poor. But a settlement may be gained, not only by a binding under either, but likewise by a voluntary binding, although not within the 5 Eliz. chap. 4., as also by one under 43 Eliz. c. 2., where the directions of that act are not literally fulfilled. The reason is, that some deviations from these statutes render the instrument void, while others make it only voidable. If void, no settlement can be acquired under it; if voidable, it is otherwise. Because, in the first case, the deed is bad as to the whole world, and for all purposes whatever; but, in the latter, it is only to be avoided at the election of the parties, and no other person can take advantage of the defect. The validity of indentures, so far as respect questions of settlement, depends upon the foregoing rule.

Settlement by binding not under either.

Binding.
1. By indenture.

The 3 Will. & Mary, c. 11. s. 5. requires, in conformity to 5 Eliz. c. 4. that the binding shall be by *in-*

accordingly with his own free will. He gained a settlement by serving under the indenture, for it was not absolutely void (1). So in the case of a parish apprentice, it was no objection that the child was only eight years old (2); or put out by the parish officers to a master residing in another parish (3) or county (4), who consequently could not be compelled to receive him. And the binding seems equally good, although the apprentice is a minor, and his parents' consent does not appear; because an infant may make an indenture for his own benefit. (5)

4. Execution.

But although the master and apprentice must be parties to the deed, yet the settlement is not prevented by the master's neglect to execute, provided the apprentice is bound (6); and the law is the same whether it be a parish or a voluntary apprentice.

The original indenture was properly executed by all the parish officers, and allowed by two justices. The counterpart was also allowed by the same justices; the master executed neither, but accepted the indenture and the pauper; the latter gained a settlement by service under this apprenticeship, although the master had not signed the counterpart, pursuant to 8 & 9 W. III. c. 30. s. 5. For the binding was authorized by 43 Eliz. c. 2. s. 5. long before the act requiring a counterpart. That act was only made to remove the doubt whether persons, to whom poor children were to be bound, were compellable to receive them, and subjects the master to a penalty upon his refusal, but in no other respect confirms the

(1) Rex *v.* St. Petrox, in Dartmouth, 4 Term Rep. 169.

(2) Rex *v.* Saltern, Cald. 444.

(3) Rex *v.* St. Margaret's Lincoln, ante, 451. (3).

(4) Rex *v.* St. Nicholas in Nottingham, post. 453. (3). Rex *v.* Saltern, 1 Const. 613. Pl. 886.

(5) Newberry *v.* St. Mary's, Fol. 154.

(6) Rex *v.* St. Peter's on the Hill, 2 Bott. 377. Pl. 403. 1 Bott. 544. Pl. 745.

power

power of binding, which was already established (1). The law is the same if the indenture is duly signed by the master and reputed parent, but not by the apprentice (2), or only by the master and parish officers when he is put out by the parish (3); for his consent shall be implied if he lives under the binding (4), even where he was originally carried to the master by his parent against his consent. (5)

5. Time of service.

So likewise, if an infant is not bound for that time which the statutes direct him to be, it does not affect the settlement; for it only renders the indentures voidable at the party's election.

Less than what required by statute.

The 5 Eliz. c. 4. s. 26. directs, that the binding, in such cases as are within the act, shall be for seven years; and sect. 41. declares, that all indentures, &c. for hiring, letting, or keeping an apprentice, otherwise than is by that statute ordained, "shall be clearly void in the law "to all intents and purposes." Yet it is held, that a binding for a less time, as four years, confers a settlement. For this section does not make the indenture void, but only voidable, if the parties themselves think fit to take advantage of it (6). So 43 Eliz. c. 2. s. 5. enacts, that male apprentices shall be bound out by the parish till the age of twenty-four (7). Yet a binding till twenty-three (8) or twenty-one confers a settlement; for the statute is only directory, and not compulsory in this re-

(1) Rex *v.* Fleet, Cald. 31.

(2) Rex *v.* Badby, 1 Bott, 547. Pl. 746. But the point was not made.

(3) Rex *v.* St. Nicholas in Nottingham, 2 Term Rep. 726. Rex *v.* Woolstanton, 1 Const. 606. Pl. 876.

(4) Ante, n. (3).

(5) Rex *v.* Woolstanton, 1 Const. 606. Pl. 876.

(6) St. Nicholas *v.* St. Peter's, Burr. S.C. 91. Rex *v.* Gainsborough, 1 Bott, 546. Pl. 745. post. Rex *v.* Evered, Cald. 26. S. C. 16 East, 27. Grey *v.* Cookson, Ibid. 13.

(7) But this is altered to the age of 21, by 18 Geo. III. c. 47.

(8) Rex *v.* Chalbury, 1 Bott, 610. Pl. 848.

spect (1). The same act directs, that *women children* put out by the parish shall be bound till they "shall come to "the age of one and twenty years, or the time of their "marriage." But a girl bound out by the parish to serve "*for a longer period* than the statute authorizes, viz. "until she should have accomplished her full age of "twenty-one years," omitting the alternative of marriage, thereby acquired a settlement. For the indenture is not void, nor voidable by any but the parties themselves. (2)

It is said further, that an indenture is good under that act, although it covenants for no certain time. (3)

6. Other statutory regulations. 7 Jac. I. c. 3. s. 2.

The remaining statutory provisions which respect apprentices, do not, at least in general, touch or affect the question of settlement. Thus 7 Jac. I. c. 3. s. 2. requires, that all corporations of corporate places; and in towns and parishes not incorporate, that the parson or vicar thereof, together with the constable or constables, the churchwarden or churchwardens, collectors and overseers for the poor, shall have the nomination and placing of apprentices, where money has been given for binding out a number of the poorest sort of children unto needful trades and occupations. A binding out of a charity fund of this sort was held sufficient, although made by the churchwardens and overseers, without the parson. (5)

So one bound apprentice to a mariner was held settled by service under his indenture, although not inrolled in the town where the apprentice was then inhabiting, nor in the next incorporate town to his habitation, pursuant

(1) Rex *v.* Woolstanton, 1 Bott, 010. Pl. 849.

(2) Rex *v.* St. Petrox, Burr. S. C. 248.

(3) Rex *v.* Woolstanton, ante, 453. n. (5).

(4) Rex *v.* Chalbury, 1 Bott, 643. Pl. 898.

to 5 Eliz. c. 5. s. 12., nor with the collector of the customs, pursuant to 2 & 3 Anne, c. 6. (1) 5 Eliz. c. 5. s. 12. 2 & 3 Anne, c. 6.

The indenture of apprentices who are put out by the parish, varies but little in substantial particulars from those under which minors are bound by their own free will, with their parents' consent. (2) 7. Parish indentures.

The chief differences are, 1st, that the parish officers must be parties to the parish indenture. The 43 Eliz. c. 2. sect. 6. required that poor children should be bound out apprentices by the said churchwardens and overseers or the greater part of them; and as the act required at least two overseers in every parish, besides the churchwardens, a binding by two persons styling themselves churchwardens and overseers, who had been appointed overseers, while one of them was churchwarden, was void, and no settlement could be gained under it; for the statute requiring that the aggregate body shall consist of more than two persons, although a majority might act, there was not a competent compulsory binding by competent persons as required by the statute. (3) Officers parties.

But the ill consequences which, it was apprehended, might result from this construction of the statute, have been remedied by the 51 Geo. III. c. 80. passed immediately after the foregoing decision, which, after reciting that in divers small parishes two persons only have been appointed to act in the capacity of church-wardens as well as overseers, and that divers indentures for binding parish apprentices have been executed and signed by 51 G. III. c. 80.

(1) Rex *v.* Gainsborough, Burr. S. C. 586.

(2) The statutes which regulate parish apprentices are, 43 Eliz. c. 2. 8 & 9 W. III. c. 30. 18 Geo. III. c. 47. 20 Geo. III. c. 36. 32 Geo. III. c. 57. 42 Geo. III. c. 46. for which see the Appendix.

(3) Rex *v.* All Saints, Derby, 13 East, 143. See also Rex *v.* Clifton, 8 East, 332. Rex *v.* Hinchley, 12 East, 361.

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such two persons, purporting to be the churchwardens and overseers of such two parishes, but by reason that the said indentures have not been signed by distinct persons or churchwardens and other distinct persons as overseers, the said indentures have been or may be deemed to be void, enacts, "That all indentures for the binding of parish apprentices, which have been heretofore executed and signed by two persons only, acting or purporting to act in the capacity of churchwardens as well as overseers of the poor, and also all such indentures as shall have been so signed, shall be considered as good, valid and effectual as if the same had been executed and signed by distinct persons as churchwardens, and distinct persons as overseers of the poor."

Assent of justices.

2d. The 43 Eliz. further requires that the binding shall be by the assent of two justices, which must be given in each other's presence, or the binding is void. "For in such a most serious subject as this, the legisla- "ture intended, that the magistrate should have a check "and controul over the parish officers, and they are "called upon to examine, with the most minute and "anxious attention, the situation of the master to "whom the apprentices are to be bound, and to exer- "cise their judgment solemnly and soberly, before they "allow or disallow the act of the parish officers; for "which purpose it is necessary that they should con- "fer together." (1) But it is sufficient although one magistrate signs the indenture when alone, provided he is present afterwards when the other signs it, for the assent of the first is also given at that time (2). As far as the matter can be traced, the assent of the justices has been always signified by signing (3): and when the master has

(1) Rex *v.* Hamstall Redware, 3 Term Rep. 380.

(2) Rex *v.* Winwick, 8 Term Rep. 454.

(3) Per Buller, J. Rex *v.* Saltern, Cald. 444. But Willes, J. was of opinion, that as the statute prescribes neither the time nor mode of assent, it

has executed the counterpart, he shall not be admitted afterwards to give evidence, that at the time of the execution it was signed only by one justice. (1)

Voluntary binding of pauper.

But the assent of the justices is only necessary where the minor is put out by the parish. It is not so when a poor person under age binds himself voluntarily as an apprentice; for 43 Eliz. c. 2. only extends to cases where a poor child is put out in a compulsory way. (2)

8. Stamps on deed.

Indentures of apprenticeship must be properly stamped (3). These stamps were of two kinds previous to 44 Geo. III. cap. 98. 1. The duties laid upon the deed itself by virtue of the general stamp acts: which were, "where the apprentice was bound out by the parish, sixpence: On all others where a sum or value, not exceeding ten pounds, was given or contracted for, with or in relation to the apprentice, twelve shillings: And where the apprentice fee exceeds that sum or value, an additional twenty shillings." And the indenture not only required a stamp, but it must be that particular one which is appropriate to deeds of this species (4), or else one which, though of a different nature, is at least equal in amount, and the component parts of which were

it may be well enough if given at any time before the sessions; and per Ashhurst, J. I don't know that we are bound to say what the statute has not said, that it is necessary for the two justices to assent before the binding. Quære whether, if the justices had expressly assented when met together, the binding would not be good, although they signed the indentures when apart from each other? See Batty *v.* Griesly, Easter, 47 Geo. III. ante, 50. and Rex *v.* Winwick, ante, 456. (2).

(1) Rex *v.* Saltern, ante, 456. (3).

(2) Rex *v.* St. Mary's, Reading, 1 Bott, 609. Pl. 845.

(3) Salford *v.* Storeford, 2 Bott, 370. Pl. 329. Rex *v.* Holbeck in Leeds, Burr. S. C. 108. Rex *v.* Llanvair Dyffryn Clwyd, Burr. S. C. 236.

(4) Robinson *v.* Dryborough, 6 Term Rep. 317. Farr *v.* Price, 1 East, 54. Chamberlain *v.* Porter, New Rep. 30.

appli-

applicable in corresponding proportions to the same funds as those to which the proper stamp was appropriated by the legislature. (1)

Want of stamp how cured.

Although the want of this stamp is a fatal objection while it continues, and renders the indentures void and unavailable in evidence (2), yet the defect can be cured by getting the instrument properly stamped. This may be done by paying the duty, together with a penalty for neglecting to have it done within the time limited by the legislature.

9. Stamp for apprentice fee. 8 Anne, c. 9. s. 32.

The other duty upon these indentures was imposed by 8 Anne, c. 9. s. 32., which enacts, that "the sum of *six-* "*pence* for *every* twenty shillings of every sum of fifty "pounds or under; and one shilling for every twenty "shillings of every sum amounting to more than fifty "pounds, which shall be given, paid, contracted or "agreed for, with, or in relation to every clerk, ap- "prentice, or servant, which shall in the kingdom of "Great Britain be put or placed to, or with any mas- "ter or mistress, to learn any profession, trade, or "employment, and proportionally for greater or lesser "sums, shall be paid by the said master or mistress "respectively."

Sect. 35.

By sect. 35. the full sum received or contracted for is to be inserted in words at length, in the indenture or writing containing the covenants, &c. relating to the service, or the master or mistress shall forfeit double the sum, and the instrument shall bear date upon the day of the execution.

(1) Taylor *v.* Hague, 2 East, 414. See 37 Geo. III. c. 46. 41 Geo. III. c. 22.

(2) Rex *v.* Llanvair Dyffryn Clwyd, Burr. S. C. 236. Rex *v.* Highnam, Cald. 491.

By sect. 36. two stamps are to be provided, one for the duty of sixpence, and the other for that of the shilling, with one of which the indentures or other writings shall be stamped, according to the amount of the sum given or agreed for. Sect. 36.

Indentures signed in London, Westminster, or within the bills of mortality, shall be stamped within one month after date. Sect. 36.

Every indenture entered into elsewhere in Great Britain, shall be either stamped within two months, or brought within that time to some collector or officer, appointed for the management of these duties, who shall endorse a receipt for the duty paid, in words at length, bearing date on the day of the payment. Sect. 37.

By sect. 38. where the endorsement is made within fifty miles from the bills of mortality, the indenture shall be stamped within three, and if at a greater distance, within six months after the date, or making thereof. Sect. 38.

By sect. 39. all such indentures or writings, as aforesaid, wherein shall not be truly inserted and written the full sum and sums of money received, with, or in relation to such clerk, apprentice, or servant as aforesaid, or whereupon the duties payable by this act shall not be duly paid, or lawfully tendered, or which shall not be stamped, or lawfully tendered to be stamped, according to the tenor and true meaning of this act, within the respective times herein for that purpose severally and respectively limited, *shall be void, and not voidable in any court or place, or to any purpose whatsoever*, and the clerk or servant whom the same shall concern or relate to, shall in such case be utterly incapable of being free of any city, town, corporation, or company, and of following or exercising the intended profession, trade, or employ- Sect. 39.

employment, any charter, law, or custom to the contrary notwithstanding.

Sect. 40. Sect. 40. Provided always, that nothing in this act contained shall be construed to extend to charge any master or mistress with the payment of any of the said duties, in respect of any money by him or her received with any apprentice or servant, who shall be put or placed out at the common or public charge of any parish or township, or by or out of any public charity, or to require the stamping with any such new stamp, as aforesaid, of any indenture, articles, covenant, or contract relating to such apprentice or servant as last mentioned; any thing herein contained to the contrary notwithstanding.

Sect. 45. Sect. 45. Where any thing or things, not being lawful money of Great Britain, shall directly or indirectly be given, assigned, conveyed, delivered, contracted for, or secured, to or for the use or benefit of any master or mistress, with or in respect of any such clerk, apprentice, or servant, for whom a duty is chargeable by this act, the duties hereby granted and last mentioned shall be answered and paid for the full value or values of such thing or things, and the same duties for the said values shall be secured and answered in the same manner and form, and under the like pains, penalties, forfeitures, and incapacities, as are before in this act provided for securing the said rates upon monies given or paid, or agreed to be given or paid, with such clerks, apprentices, or servants as aforesaid. (1)

(1) The foregoing clauses respect the duty as it affects the validity of the indentures upon which the settlement depends. There are other sections as well as subsequent statutes which enforce penalties on the master for neglecting to pay the duty, and give the apprentice time to get his indentures stamped, under particular circumstances, and upon certain conditions. But it seems unnecessary to state them here, as they do not affect the question of settlement. Such are 18 Geo. II. c. 22. ss. 24, 25, 26. 20 Geo. II. c. 45. ss. 5, 6, 7, 8. 5 Geo. III. c. 46. ss. 18, 19. 41.

This duty must be paid, where a fee of twenty shillings or more is given to the master; and if a proper stamp is not affixed, in pursuance of the statute, the indenture cannot be given in evidence, but is void, and no settlement is gained by serving under it. (1)

Exceptions from 8 Anne, c. 9. 1. No consideration.

Some indentures however do not require this stamp, as not being within the scope of the act; and others are expressly exempted. Thus it seems hardly to have required a case to determine, that indentures where no consideration money is given with the apprentice, are not within the statute. (2)

2. Under 20s.

So likewise, sums under twenty shillings are exempt from this duty; for the legislature, by fixing it at so much for every twenty shillings, limit that as the smallest sum upon which the tax is payable (3). And the indentures will not be avoided if the duty is paid on a greater sum than was actually received by the master, although sect. 39. requires, that the full sum received shall be truly inserted therein; for this only means that no part of what is paid shall be concealed. Thus, where the sum agreed to be paid was five guineas, which was inserted in the indenture, and the duty was paid on five guineas, although in fact only four guineas were paid; the apprentice gained a settlement under the indentures, because the duty was paid on the sum contracted for; and even if four guineas were all the master was to have, still the words of the act have been complied with, for the full sum paid, and more, has been inserted, and the duty paid upon it, and the proper stamp appropriated to this description of instruments has been used. (4)

Duty paid on more than master receives.

(1) Cuerden *v.* Leland, 1 Butt, 541. Pl. 742. Rex *v.* Ditchingham, ante, 450. n. (5).

(2) Rex *v.* St. Peter's Chester, 1 Bott, 544. Pl. 745.

(3) Rex *v.* Yarmouth, Burr. S. C. 379. Baxter *v.* Faulam, 1 Wils. 149. where the sum given was 6d.

(4) Rex *v.* Keynsham, Trin. 44 Geo. III. 5 East, 309.

It

3. Things for apprentice's use.

It has been likewise held, that this act applies only to money, or things of value received by the master by way of premium for his own benefit; but that such things are exempt from duty, if given solely for the apprentice's use.

Money to clothe apprentice.

A master refused to take an apprentice because he wanted clothes, upon which the grandfather agreed to pay the master thirty shillings to clothe the boy, which he did, and no mention was made of this sum in the indenture, nor any duty paid; yet service under this indenture gave a settlement; for the master was to be considered as an agent for the grandfather in clothing the boy. The clothing was before binding, and it is only putting a boy apprentice ready clothed. The statute means money given for the benefit of the master, but the master here had no benefit; he was not obliged to clothe the boy before he was his apprentice. (1)

Meat, drink, &c. found by the father: the master allowing an equivalent.

A pauper's indenture covenanted, that "sufficient "meat, drink, apparel of all kinds, physic, surgery, "and lodging, and all other necessaries, during the "same term, to be found and provided for the said apprentice *by the said father*, which the said father for "himself, his executors and administrators, doth covenant and agree to find the said apprentice during "the said term: for which purpose the said *master is to* "*allow him, or them*, the sum of four shillings per week, "weekly during the said term." A proportionable deduction of the weekly allowance was further agreed to be made for voluntary absence. The indenture was not stamped with a six-penny or twelve-penny stamp under 8 & 9 Anne. The court were unanimous, that it was unnecessary: for there was nothing before them to shew that the four shillings a week was not an equivalent.

(1) Rex v. North Owram, 2 Str. 1132. Burr. S. C. 145.

Aston

Aston J. hinted, that the 45th sect. of 8 Anne, c. 9. which says, "that where any thing, or things, not being "lawful money of Great Britain, shall be directly or "indirectly given," means such other equivalents, as a horse, or other valuable thing of that sort, and did not apply to an agreement "to provide necessaries for "a son." (1)

Apprentice finding his own meat, &c.

So a pauper covenanted by his indentures, "that he "would at his own expence provide for himself meat, "drink, washing, lodging, apparel, and physic, during "the term;" and there was a covenant on the part of the master to pay the pauper for the first three years five shillings per week, six shillings per week for the succeeding two, and seven shillings a week for the remainder of the term, with a proviso, that he should not be entitled to wages during absence from sickness or negligence. *There was no stamp*, and it was held unnecessary upon the principle of the last case, that the master paid an equivalent, and received no benefit within the meaning of the statutes. (2)

Meat, &c. found without stipulation for an equivalent.

In a latter case, it was held that such an agreement was not subject to the tax, although the master did not stipulate to pay an equivalent for those things which he was exempted by covenant from supplying for his apprentice.

A father bound his son apprentice under an indenture for four years, to learn the trade of a shoemaker, in which was a covenant by the father of the apprentice, "that he would at his own charge find and provide for "his son good, competent, and sufficient meat, drink, "and lodging, on every Sunday in the year, during the

(1) Rex *v.* Portsea, Burr. S. C. 834.

(2) Rex *v.* Walton in Le Dale, 3 Term Rep. 515.

"said

" said term; and would provide him with clothes and " apparel of all sorts, except working aprons and shoes, " and also washing." There was also (*inter alia*) a covenant on the part of the master to provide for the apprentice meat, drink, and lodging, except on Sundays, during the term. The indenture was properly executed and attested, and written on a five shilling stamp. The pauper served under it for four years, for six days and nights each week; and went to his father's, in another parish, every Sunday. The pauper's father expended 5l. and upwards in clothing his son and providing meat, drink, &c. for him on Sundays during the four years under this covenant: for this no additional duty was paid according to 8 Anne, c. 9.

Lord Kenyon, C. J. " This has been *vexata questio* ever " since I came into Westminster-hall; and various opinions " have been entertained upon it. It is true, that if an in- " denture be taken to the stamp office, they will set their " value upon every supposed benefit to the master for the " sake of the revenue; but that is by no means decisive. " The question depends on the Stat. Anne, c. 9. s. 22. " 45.; the former of which sections imposes a duty on all " sums of money given with any apprentice, &c.; and " the latter enacts, that where any thing, not being mo- " ney, shall be given, contracted for, or secured, to or " for the use or benefit of the master, the duty shall be " paid for the full value of such things, in the same man- " ner, &c. The latter provision was inserted for the " purpose of protecting the revenue from any fraud which " might otherwise be practised, by the parties giving " something in lieu of money. For if, as in the case put " by Aston, Justice, a horse, or other valuable thing of " that sort, be given by the friends of the apprentice " to the master, that must be considered to be a benefit " to the master, for which a duty should be paid. It

" occurred

" occurred to me early in the argument that, in order to
" see what would or would not be considered as a benefit
" to the master, it was necessary to inquire what were
" the duties that resulted from the bare relation of master
" and apprentice. And I think that the statute of
" 8&9 W. III. c. 30. s. 5. throws a great deal of light upon
" that point; because if, from the time of the statute of
" Elizabeth to that time, masters could not be compelled
" to provide for parish-apprentices, and that law was
" made for the purpose, it shews that the obligation of
" providing for apprentices did not result from the mere
" relation of master and apprentice; for if it did, that
" part of the statute of Will. III. was unnecessary. The
" case of parish apprentices is the only one where an ap-
" prentice can be put out *nolens volens;* all the others
" depend on the express stipulations to be made by the
" parties interested. It has never been held that the ob-
" ligation of the master extended to the providing of
" clothes for the apprentice, and yet I cannot distinguish
" that from the obligation to provide sustenance: for the
" former are equally necessary with the latter; and in
" other cases than those of parish apprentices, clothes are
" generally provided by the friends of the apprentice.
" But if every thing is to be valued, and a duty set upon
" it, from which a benefit arises to the master, it might
" be equally said, that the earnings of the apprentice
" should be liable to the duty. The argument therefore,
" that every benefit which the master derives from the
" apprentice is liable to this duty, by proving too much,
" proves nothing. The authority of *Aston J.* Justice
" is in all cases worth resorting to, but particularly so
" in cases of sessions law, in which he was remarkably
" conversant. And his opinion, in the case alluded to, is
" very strong to this point. I think, therefore, that the
" clear meaning of the statute of Anne is, that where
" money, or money's worth, is given to the master by

" the friends of the apprentice, by way of premium, a " duty ought to be paid for it; but, that where meat, " clothes, &c. are to be provided *by the master* (1), no " duty is payable, because there is not any thing given " to the master." (2)

Apprentice's earnings.

In a more recent case, in addition to the pauper's agreement, to find himself in clothes, board, washing, and lodging, it was stipulated, that the master should allow him full journeyman's wages, and have four-pence out of every shilling of his earning. But it was thought too clear to admit of argument, that a part of the apprentice's earnings reserved to the master was not a benefit liable to duty under the statute. For by law, he was entitled to the whole, and might rather be said to have given up that part which he did not reserve, than to have acquired any thing. (3)

Sect. 40. expressly exempts from duty, money given with apprentices, in two cases.

Apprentices put out at parish charge.

1st. Where the apprentice or servant is " put out at " the common or public charge of any parish or town- " ship." These words comprehend not only parish apprentices, formally bound out by parish officers with the assent of two justices, but voluntary apprentices also, provided the master's fee or premium is taken from the public parish fund. (4)

By public charity.

The 2d exception is, of money paid " out of any

(1) Sic in orig. Qu. If it should not be, by them for the apprentice.

(2) Rex *v.* Leighton, 4 Term Rep. 732.

(3) Rex *v.* Wantage, 1 East, 601. See also Rex *v.* Bradford, 1 Maule and Selw. 151. post.

(4) Rex *v.* St. Petrox in Dartmouth, 4 Term Rep. 196. The words, however, of 44 Geo. III. c. 98. differ somewhat from those of 8 Anne, c. 9. See post. 474.

" public

" public charity." The court has given a liberal construction to this clause. They have held therefore, that it need not be a *permanent charity.*

Charity not permanent.

In the parish of St. John's, Wapping, there was a voluntary annual subscription by divers of the inhabitants, for putting apprentice, boys and girls brought up at the parish charity-school. Four trustees and a treasurer were annually elected to manage the charity, and a number of children were annually bound out. This was held a public charity, and within the proviso. A boy, therefore, bound by indenture, whose master received five pounds from the trustees of this charity, gained a settlement, although not stamped with a stamp, denoting the receipt of this duty. For *per* Lord Mansfield, this is a public charity. *It is not necessary that it should be a permanent charity.* The reason of the distinction between a public and private charity is obvious. A private charity may be calculated to evade the act, which a public one cannot be supposed to be. (1)

Extent of fund immaterial.

Neither is the extent of the fund, or number of its objects material. The criterion of a public charity, within this act, appears to be, that the object of the charity should be general, without having any particular individuals in contemplation at the time it is created, as otherwise the duty might be easily evaded.

A woman bequeathed, among other charities, by her will, " to Clifton, (the parish in which she resided) fifty " pounds, to be given as my brother thinks fit; some of " it to put out children apprentices." Three children were put out by the brother under this bequest. Seven pound was given to the master with one of them, and it was expressed in the indenture to be charity-money, but

(1) Rex *v.* St. Matthew's Bethnal Green, Burr. S. C. 574.

there was no stamp denoting the payment of the six-penny duty, nor was it paid. The court of quarter session found that it was a public charity, and that the said legacy (which was charged on lands) was not paid for eight years after the will was proved, and on that account seventy pounds were paid. It was argued, that this was not a public, but a private charity, being left entirely to the choice of the testator's brother, whether to put out children apprentices with this money or not. But the court held it a public charity, and that the pauper gained a settlement. (1)

These stamp duties have been altered considerably by 44 Geo. III. chap. 98. It was necessary, however, to state the substance of the former statutes, not only because all indentures of apprenticeship made prior to the 10th of October 1804, are regulated by them, but also, because 44 Geo. III. c. 98. provides, that they shall continue in force, except so far as any alteration is thereby expressly made. (2)

From 10 Oct. 1804, Duties, &c. under care of commissioners of stamps, shall cease.

Sect. 1. That, from and after the tenth day of October, one thousand eight hundred and four, all and singular the duties, allowances, discounts, compensations, and drawbacks of stamp duties, and other the duties under the care of the commissioners for managing the duties upon stamped vellum, parchment, and paper, granted by any act or acts of parliament now in force, shall cease and determine, save and except in all cases relating to the recovering, allowing, or paying any arrears thereof respectively, which may at that time remain unpaid, or to any fine, penalty, or forfeiture, fines, penalties, or forfeitures, relating thereto respectively, which shall have

(2) Rex v. Clifton upon Dunsmore, Burr. S. C. 697.

(3) Sect. 8. post.

been

been incurred at any time before, or on the said tenth day of October, one thousand eight hundred and four.

Sect. 2. That, from and after the said tenth day of October, one thousand eight hundred and four, in lieu and instead of the said duties respectively, by this act repealed, there shall be raised, levied, collected, and paid, in England, unto His Majesty, his heirs and successors, for and in respect of the several instruments, articles, matters and things, mentioned, enumerated, and described in the schedules marked (A) and (B), hereunto annexed, the several sums of money and duties as they are respectively inserted, described, and set forth in the column of the said schedules, marked (A) and (B), intitled "England;" and that there shall be raised, levied, collected, and paid in like manner in Scotland, the several sums of money and duties as they are respectively inserted, described, and set forth in the column of the said schedules marked (A) and (B), intitled, "Scotland;" and that there shall be made, allowed, and paid, for or in respect of all such articles, matters, or things, as are inserted, enumerated, and described in the schedule marked (C), hereunto annexed, the several allowances, drawbacks, or sums of money, as the same are respectively inserted, described, and set forth in the said schedule marked (C).

From 10 Oct. 1804, duties in schedules (A) & (B) to be paid.

Sect. 8. And be it further enacted, that the said several sums of money respectively inserted, described, and set forth in the said schedules marked (A) and (B) as duties payable to His Majesty, his heirs and successors, and the several allowances, drawbacks, and sums of money for or in respect of the several articles, matters, and things inserted, described, and set forth in the said schedule marked (C), shall and may be respectively raised, levied, collected, answered, paid, recovered, adjudged, mitigated,

Duties and drawbacks to be paid and allowed as former duties and drawbacks; provisions of former acts to extend to this act, except so far as hereby altered.

mitigated, and allowed, except where any alteration is expressly made by this act, in such and the like manner, and in or by any or either of the general or special means, ways, or methods, by which the former duties under the management of the said commissioners of stamped vellum, parchment, or paper respectively, and the allowances and drawbacks under the management of the said commissioners respectively, were or might be raised, levied, collected, answered, paid, recovered, adjudged, mitigated, and allowed; and the several persons, and also all vellum, parchment, paper, or other material of what nature or kind soever, upon which any matter or thing shall be written, printed, or ingrossed, and by this act respectively made liable to the payment of duty, and also the several other articles, matters, and things, by this act respectively made liable to the payment of duty, or which shall be entitled to any allowance or drawback, as respectively inserted, described, and set forth in the said schedules, marked (A), (B), and (C), shall be, and the same are hereby made, except where any alteration is expressly made by this act, subject and liable to all and every the conditions, regulations, rules, and restrictions, to which such persons, and also such vellum, parchment, paper, or other material of what nature or kind soever, upon which any such matter or thing as aforesaid shall be written, printed, or engrossed, and other articles, matters, and things as aforesaid, were generally, or specially subject and liable by any act or acts of parliament in force before or on the said tenth day of October one thousand eight hundred and four, respecting the duties under the management of the said commissioners of stamped vellum, parchment, and paper; and all and every pain, penalty, fine, or forfeiture (except where any alteration is expressly made by this act), for any offence whatsoever, committed against, or in breach of any act or acts of parliament now in force, before or on the said

tenth day of October one thousand eight hundred and four, for securing the duties under the management of the said commissioners of stamped vellum, parchment, and paper, or for the regulation or improvement of the said duties, and the several clauses, powers, provisions, directions, matters, and things therein contained (unless where expressly altered by this act), shall, and are hereby directed and declared to extend to, and shall be respectively applied, practised, and put in execution, for and in respect of the several duties by this act charged, imposed, and allowed, in as full and ample a manner, to all intents and purposes whatsoever, as if all and every the said clauses, provisions, powers, directions, fines, pains, penalties, or forfeitures, matters, and things, were particularly repeated and re-enacted in the body of this act.

Where instruments, except bills of exchange, &c. have, without fraudulent intention, been written on improper stamps, the commissioners may remit the penalty, if brought to be duly stamped within 12 months after execution.

Sect. 24. That in any case where it shall appear to the commissioners of His Majesty's stamp duties, upon oath or affirmation, to be made before any one or more of the said commissioners (which oath or affirmation he or they is or are hereby authorised to administer), or otherwise to their satisfaction, that any instrument, matter, or thing whatsoever (except bills of exchange, promissory notes, or other notes, drafts, orders, or receipts, required by law to be ingrossed, printed, or written on stamped vellum, parchment, or paper), hath been ingrossed, printed, or written on vellum, parchment, or paper not duly stamped with a stamp of the value by this act required, either by accident or inadvertency, or from urgent necessity, or unavoidable circumstances, and without any wilful delay or intention in any party or parties thereto, to evade the duties by this act imposed, or to defraud His Majesty thereof; and such instrument, matter, and thing, shall be brought to the said commissioners to be stamped within twelve months after the making or

execution thereof, it shall be lawful for such commissioners of His Majesty's stamp duties to remit the penalty payable on stamping such instrument, matter, or thing, or any part thereof, as they shall deem expedient; and every person concerned in ingrossing, printing, or writing any such instrument, matter, or thing, or in making or executing the same, shall be, and he or she is hereby freed, discharged, and indemnified from all further penalties or forfeitures, than such penalties or forfeitures or such parts thereof, as shall not be remitted by order of the said commissioners of His Majesty's stamp duties.

Schedule A. These stamp duties, so far as respect instruments which are executed in England, and relate to settlements by service or apprenticeship, are thus set forth in schedule (A) to which the act refers.

Articles to serve clerk to an attorney, in courts at Westminster. Articles or contracts whereby any person shall become bound to serve as a clerk, in order to his admission as a solicitor or attorney, in pursuance of the laws now in force in any of His Majesty's courts at Westminster, 110l.

Articles of clerks to attornies in other courts. Articles or contracts whereby any person shall become bound to serve as a clerk, in order to his admission as a solicitor or attorney in any of the courts of great sessions in Wales, or in the counties palatine of Chester, Lancaster, or Durham, or in any court of record in England, holding pleas, where the debt or damage shall amount to forty shillings or upwards, not being in any of His Majesty's courts at Westminster, 55l.

Assignments thereof. Assignment of such articles or contract, or new articles or contract, for the residue of a term, occasioned by the death of any former master, 1l. 10s.

Agreement made in England under hand only, where the matter thereof shall be of the value of 20l. or upwards, whether the same shall be only the evidence of a contract or obligatory upon the parties from its being a written instrument, upon any number of words, not amounting to thirty common law sheets (calculated at seventy-two words to each sheet) of which any such agreement shall consist, 16s. Agreements.

And for every entire quantity of fifteen common law sheets (calculated at seventy-two words to each sheet) of which any such agreement, together with every schedule, receipt, instrument, or other matter put or indorsed thereon, or annexed thereto, shall consist, over and above the first fifteen common law-sheets, a further duty of 16s. Agreements.

It has been held that when an apprentice covenanted by his indentures to allow his master 2s. per week, and to have wages and provide for himself, the indentures did not require an additional stamp under this act, for this cannot be considered as a sum given to the master who had a right to the whole earnings of his apprentice, but allowed by way of wages such a sum as they are computed at minus 2s. per week on account of his providing for himself. (1)

Special Exemptions.

Memorandum or agreement for the hire of any labourer, artificer, manufacturer, or menial servant. Exemptions.

(1) Rex *v.* Bradford, 1 Maule and Selw. 151.

Inden-

Indentures of apprenticeship.

Indenture of apprenticeship where the sum or value given, paid, contracted or agreed for, with or in relation to such apprentice, shall not exceed £10 £ 1 5s.

exceeding £10, and not exceeding	20	1	10
exceeding 20, and not exceeding	50	2	10
exceeding 50, and not exceeding	100	5	0
exceeding 100, and not exceeding	300	12	0
exceeding 300 - - - -		20	0

Special Exemption.

Exemption.

Indentures for binding poor parish children apprentices, or other children, by any public charity.

Assignment of indenture of apprenticeship (except of poor parish children, or other children, by any public charity), 15s.

II. *Of the Distinction between imperfect Contracts of Apprenticeship, and Contracts of Hiring and Service.*

It has been shewn already, that particular forms are required to render a contract of apprenticeship valid (1), which are unnecessary in the case of hiring of a servant. (2)

This latter contract, however, may be executed with all the formalities incident to deeds of apprenticeship. It is sometimes difficult therefore to distinguish between them; especially as cases of imperfect apprenticeship, by reason of their defect, approach nearer in resemblance to the more loose form of contracts for service under an agreement of hiring.

No technical word to

It seems at one time to have been thought necessary to use the term *apprentice*, in order to constitute a binding

(1) Ante, 449. (2) Ante, 303, &c.

as such (1). But neither this, nor any other technical expressions are essential, provided the parties shew by the words used in the instrument an evident intention to constitute the relation of master and apprentice. (2) constitute a binding.

The court indeed seem to regret that a criterion, equally certain and more general, has not been resorted to (3). This might have been, if regard being had to the derivation of the term (4), every agreement by which the master engaged to teach, and the person agreed with undertook to learn a trade, without contracting to serve in other respects, had been held an apprenticeship. (5)

But this distinction has been overlooked, and a settlement may be gained as an hired servant, although the object of the agreement and service be to learn a trade (6). As the parties may lawfully enter into either engagement, the particular nature of the agreement is to be collected from their intention at the time of making it. Where the contract is in writing, this must be drawn from the words made use of; "for parol evidence cannot be re- "ceived to contradict a written agreement. But it may "to ascertain a fact collateral to the written instrument, "in order to explain the intention of the parties; the "written instrument being in some measure equivo- "cal." (7)

(1) See 3 Bac. Abr. 546. and Rex *v.* Little Bolton, post. (5).

(2) Per Lord Kenyon, C. J. Rex *v.* Laindon, 8 Term Rep. 379. Pl. 1000; and in Rex *v.* Rainham, 1 East, 531.

(3) Per Lawrence, J. Rex *v.* Laindon, ante, (2).

(4) From Apprendre, to learn.

(5) Per Lord Ellenborough, C. J. Rex *v.* Eccleston, 2 East, 298. Per Lord Kenyon, C. J. Rex *v.* Laindon, ante, (2). Per Lord Mansfield, C. J. Rex *v.* Little Bolton, Cald. 367. But he afterwards held a contrary opinion with the rest of the court.

(6) Rex *v.* Hitcham, ante, 257, and the cases post.

(7) Per Lawrence, J. Rex *v.* Laindon, ante, (2).

Upon

Contracts of apprenticeship give no settlement.

Upon this principle, an agreement which is defective as a contract of apprenticeship, from any of the following circumstances, cannot be converted into or considered as one for hiring as a servant so as to confer a settlement.

1. When term apprentice used.

If the parties use the term apprentice in describing the relation to be created by their contract, or otherwise expressly declare their intention to stand in the situation of master and apprentice.

Binding as apprentice to stone mason, &c.

G., aged twenty-two, agreed with a stone mason, that the latter should take him *apprentice* for six years, and teach him his trade; and the master to provide him meat, drink, washing, lodging, and clothing, *during his apprenticeship*, and G. to live with, and work for him, *as his apprentice during that term*, and that *indentures should be executed between them accordingly;* but no such indentures were executed. The pauper gained no settlement as an apprentice, because there were no indentures, nor as an hired servant, for he was engaged to serve as an apprentice. (1)

A parol agreement was proved between the pauper's grandfather and the master, *to take the pauper as an apprentice*, and no indentures were executed.—He gained no settlement. (2)

So where the agreement in writing recited, "that the "pauper is to be *bound apprentice*," but it was not stamped, no settlement was gained. (3)

The pauper, W. H., being fourteen years of age, went

(1) Rex *v.* Whitchurch Canonicorum, ante, 314. Rex *v.* St. Mary Kallendar, Burr. S. C 274. S. P. Rex *v.* Margram, where the agreement was "to serve seven years as an apprentice," 5 Term Rep. 153.

(2) Rex *v.* Kingsweare, Burr. S. C. 839.

(3) Rex *v.* All Saints, Hereford, Burr. S. C. 656. and the cases there cited.

as

as an apprentice to K. and continued to serve him as an apprentice for five years. The following indenture was executed by K. the master and J. H. the father, but not by W. H. the pauper. This agreement made 1st May 1796, between N. K. Weever and J. H. Minir; and the said N. K. shall teach or cause to be taught W. H. the son of J. H. the art and mystery of weaving, &c. in the best way he can for five years, N. K. to find W. H. all utensils belonging to the business, and W. H. to have half what he earns, &c.—The agreement was signed and sealed by N. K. and J. H. The court were of opinion, that W. H. gained no settlement by the five years service under this agreement. There was neither a binding of the son himself nor of his father for him.—There was no contract for his serving his master; he could neither have been proceeded against under the statutes for regulating apprentices, nor could an action be brought against any one for harbouring him as an apprentice. (1)

2d. Although the term apprentice is not made use of, yet if the party gives a premium to the master who engages to teach him some trade or mystery, it is a contract of apprenticeship. For a servant never gives such a consideration (2); and such agreements would otherwise evade the duties imposed by 8 Anne c. 9. 2. Premium given.

The Sessions found that the pauper went to his master (who was a carpenter) for the purpose of *being his apprentice* for four years, in order to learn the trade; and to save the expence of the indenture and duty, four guineas consideration being paid by the pauper to the master, they signed an agreement upon unstamped paper, wherein the pauper covenanted to serve his master in the business or trade of carpenter for four years, and the con-

(1) Rex v. Cromford, 8 East, 25. ante, 451.

(2) Per Lord Mansfield, Rex v. Highnam, 2 Const. 373. Pl. 436.

sideration.

sideration of the agreement was, that the master do pay him so much a week, which wages were to be increased yearly, until the expiration of his time. The court thought that this was manifestly a fraud on the revenue, and that the relation intended was that of an apprentice, which being void for want of proper stamps, the pauper acquired no settlement by serving under the agreement. (1)

In this case the intent to evade the duty was expressly found: but the construction of the agreement is the same where this intention is not so manifest.

A pauper by a written agreement on unstamped paper, "agreed to serve three years, to learn the business of a "carpenter, and to receive wages, which were to in-"crease each succeeding year." The pauper also proved by parol, that at the time of signing the above agreement, he agreed to give his master three guineas, as a premium to teach him the trade, and was not to be employed in any other work than that of a carpenter: it was held a defective contract of apprenticeship. (2)

3. Deed executed in due form.

3d, It *seems* further, that wherever the contract is executed with the solemnities incident to a binding by deed, and the object of the agreement is to instruct the party serving, it is rather to be considered as a contract of apprenticeship, than of hiring as a servant.

The pauper, M. Smith, agreed with T. Hills, a sawyer, to serve him for three years, at weekly wages. "And "the said T. H. doth agree and promise to learn the

(1) Rex *v.* Highnam, Cald. 491. It was also proved by the pauper, that at the time of signing this agreement, it was further agreed by parol, that the pauper should find his own diet and lodging, was to be his own master on Sundays, and to be paid only a part of his stipulated weekly wages proportionable to the time he should work.

(2) Rex *v.* Laindon, 8 Term Rep. 379. ante, 475.

"said

" said M. Smith, the art and mystery of a sawyer, which " he now follows." It was further agreed, if he should wilfully lose any time, he was to pay H. three shillings a day; and if he repented of the agreement before the time expired, to pay H. 10l.; and if he should be incapable of working, he was not to receive any wages. The agreement was signed, sealed, and delivered by both parties, and lawfully stamped, and no premium was paid by the pauper to his master.

Lord Kenyon, C.J. The legal conclusion can only be drawn in one way, namely, that this was a contract of apprenticeship. The instrument was under seal, and need not be indented. It has been determined, that the party serving need not be retained *eo nomine* as an apprentice: but that it is enough if the purpose of the contract be, that the one shall teach and the other learn the trade. That is the case here, for the master engaged to learn, *i.e.* to teach the pauper the art and mystery of a sawyer; and the object of the pauper was to be taught the business. No technical words are necessary to constitute the relation of master and apprentice; nor is it necessary that there should be any premium given to the master.

Mr. J. Le Blanc, the only remaining judge who gave an opinion, observed, that it was immaterial to the present case, whether the contract was to serve as an apprentice, or as an hired servant; for having served a year, he gained a settlement either way. (1)

Contracts for service, when servants to be taught.

But where none of these circumstances occurred to determine the nature of the agreement, it has been held, that a contract to serve for the purpose of learning a trade, is an hiring as a servant.

(1) Rex *v.* Rainham, 1 East, 531. But it would have been necessary to determine, in what capacity the pauper served, if he had been married when he made the contract, or had not abided in the service for an entire year.

1st. If

1. If he is to do all sorts of work.

1st. If the party engages to do the duties of a servant, ulterior to such as are incident to the trade he learns; for the extent of the service points out and explains the relation in which the parties intended to stand towards each other. (1)

The pauper clubbed, *i. e.* contracted to serve for the purpose of being taught the trade of a bricklayer, and to have less wages, on account of learning the trade. He was to serve three years, at six shillings a week the first year, seven shillings the second, and eight shillings the third. An agreement in writing was to be prepared, but was never drawn up. No premium was paid, and he was to do any work his master set him about, and was not to be absent from his business during any part of the time.

Lord Kenyon, C. J. said, "it was impossible to raise "a doubt upon the case; the part which states that the "pauper was to do any work his master set him about *is* "*decisive* to shew, that he must be considered as an "hired servant, and although one of his objects was to "learn a trade, that was deemed an equivalent to part "of his wages." (2)

And the same was held, where, to an agreement in other respects similar to the preceding, it was added, that if the pauper was prevented from working at any time by badness of weather, illness, or his master's not having employment for him, a proportionable deduction

(1) But this rule applies only to equivocal contracts. If a yearly hiring is made out, a settlement may be gained, although the agreement be to work, only at a particular trade. Rex v. Buckland Denham, ante, 337. where the principle is not disputed, Burr. S. C. 694. Rex v. Birmingham, ante, 337-338. Dougl. 333. Rex v. Alton, Cald. 424.

(2) Rex v. Coltishall, 5 Term Rep. 193. and see the opinion of Ashhurst, J. Rex v. Highnam, ante, 478.

should

should be made from his week's wages for such loss of time. (1)

2d. There is a case which, unless it is to be considered as "an anomalous case (2)," seems to go the length of establishing the following principle:—That all contracts of service, for the purpose of instruction, which are informal as contracts of apprenticeship, are to be taken as contracts of hiring, where no direct circumstance appears to shew, that a contract of apprenticeship was intended, and no premium is given to the master.

2. Contract not appearing intended as an apprenticeship, and no premium given.

This rule does not seem unreasonable, unless it leads to uncertainty.

It is an established maxim of law, that ambiguous instruments are to receive a judicial construction, *ut res magis valeat quam pereat.* Independent of which, the old decisions lean neither unwisely, nor unconstitutionally, in favour of settlements. (3)

The pauper being unmarried, and having no child, went to one S. a weaver, and asked him if he would teach him to work counterpanes. S. answered he would, if he would work *with him two years and a half, or three years;* and the pauper's earnings were to be divided between them, and he to find himself with meat, drink, washing, and clothes. He was engaged on these terms, and an agreement in writing was entered into accordingly. He worked under this agreement a year and an half, his master finding him in looms, loom room, and materials, when he gave his master twenty shillings to be free, having then married. He continued to work journey-work

Service by written agreement for two or three years, to be taught to weave counterpanes.

(1) Rex *v.* Martham, 1 East, 239.
(2) Verba Kenyon, C. J. Rex *v.* Laindon, ante, 475. (2).
(3) See the opinion of Buller, J. Rex *v.* Little Bolton, Cald. 370. post. 482. (1).

with the same master for a year. S. *never employed the pauper in any work but weaving.* He received the money, and paid the pauper one half, and looked on it, that he had a right to receive it, but sometimes let the pauper do so. Lord Mansfield was originally of opinion, "If an indenture be not made necessary (*i. e.* to constitute a binding as an apprentice), there could be no doubt as to its being an apprenticeship; for the pauper is *to be taught*, and pays a consideration for it, and is to do no other work: but if these agreements were allowed to give settlements, there would be an end of indentures of apprenticeship, and also of the revenue derived from thence." But Buller J. doubting, the court took time to consider, and Lord Mansfield on another day delivered their opinion: "We have looked into the authorities, and find that all those cases of apprenticeships which have been holden to be defective, and not convertible into hirings and services, speak of the pauper as an apprentice, and that he was to serve as such. There is no such statement here, and it is therefore a good hiring and service." (1)

By unwritten agreement.

And in a very recent case, in which the circumstances were similar, but the agreement was not in writing, the court held it an hiring and service upon the authority of the foregoing decision. Lord Ellenborough, C. J. declared, that he was not convinced by the reasoning of the preceding case, and that if the point were new, he should think otherwise, and "that where the contract was, that the master should teach the other a trade, *and the latter was to do nothing ulterior the employment* in that trade, it was a contract *apprendre*, in the true sense of the word."

The other judges coincided in opinion upon the same ground, Le Blanc, J. adding, "that he did not think

(1) Rex *v.* Little Bolton, Cald. 367. 2 Bott, 221. Pl. 264.

that

that the King *v.* Little Bolton had been overruled in principle (1)." And in a subsequent case Lord Ellenborough, C. J. observed, that whatever question there might have been on the subject at first, the convenience of the thing is in support of the King *v.* Little Bolton. (2)

In a subsequent case the pauper R. L. being a minor hired himself for a year to J. P. brickmaker: three months afterwards, being still a minor, he signed the following agreement on unstamped paper, and not under seal:—" A memorandum and agreement between J. P. and R. L. This agreement, made 29th September 1806, between J. P. brickmaker of S., &c. and R. L. I R.L. do hereby covenant and agree to serve J. P. for three years to learn to make bricks and the art of burning, on condition of the said J. P's. finding me the said R. L. sufficient victuals, drink, lodging, and clothes, and to be decently clothed in the habit of a working man at the expiration of the three years, on condition of my helping to attend the kiln on nights. Whereas I have hereunto set my hand, this 29th September, 1806, R. L." Attested by two witnesses, and on the margin was written, " I J. P. consenting to the above agreement." The court decided that supposing the instrument to be intended as a contract of apprenticeship and invalid for want of a stamp, it did not put an end to the original valid contract of hiring, under which R. L. by having served a year acquired a settlement at all events. But two of the judges (3) gave an express opinion, that " the instrument was a contract of service " and not of apprenticeship; there was an original good " contract for a year between the parties as master and

(1) Rex *v.* Eccleston, 2 East, 298.
(2) Rex *v.* Shenfield, 14 East, 546.
(3) Le Blanc and Bayley, J.; and the remaining judgments seem to lean that way.

" servant generally, and after three months' service un-
" der it, they entered into a new agreement, by which
" the boy was to serve his master for three years, not
" generally, but to learn to make bricks and the art of
" burning, upon condition of being found in board,
" lodging, and clothes. The meaning of the parties
" therefore was, that the general service before con-
" tracted for should be restrained to such service as
" would enable the boy to learn his master's business.
" If an apprenticeship had been intended, there would
" have been words introduced into the agreement bind-
" ing the master to teach the boy; and there being no
" such words of obligation on the master, and the writ-
" ten contract not having the ordinary words of bind-
" ing to serve as an apprentice, and the intent of the
" parties as collected from the terms of it, being at least
" equivocal; we are warranted by the cases in saying
" that the object of it was merely to confine the general
" service before contracted for, to such part of the mas-
" ter's employ as would enable the boy to learn his busi-
" ness. If this, therefore, was to give an extraordinary
" benefit to the servant, the master might well stipulate
" for receiving such service without the payment of
" wages. (1)

Lastly, where a case stated that the pauper being unmarried and having no child, his father made a verbal agreement with one R. P. framework-knitter, that the pauper should be with him and work with him for two years, and to have what he got, and that he should allow two shillings per week out of his gains to P., viz. 1s. for teaching him the business of a framework-knitter, 9d. for the rent of a frame, and 3d. for the standing. Nothing was said about his being an apprentice. He served the two years, and had what he earned after the

(2) Verba Bayley, J. Rex *v.* Shenfield, 14 East, 541.

2s. per week were deducted by P., who found a frame and all materials, but the pauper paid for the needles, and earned about 10s. per week. He had no right to work for any body else in P's. frame, nor did he do so to P's. knowledge. He received no wages, and boarded and slept at his father's house, where he also had his washing done, and he did not do any act as a servant for P. by his order, and on Sundays he was at his father's house.

Lord Ellenborough, C. J. The ground of argument taken is, that the father was the contracting party and could not bind the son. It certainly cannot be contended that the son would, at all events, be bound by the contract of the father, but in every case, if a contract be made by a person standing in a peculiar relation to another on his behalf and for his benefit, and that other performs his part of the contract, there is no authority which should restrain me from leaving to the jury whether he did not adopt the contract. It seems absurd to say, that if a party contract on my behalf that I should do work and I do it, that the rule *omnis ratihabitio* does not apply. Every jury upon such a question would find a previous mandatum evidenced by the service afterwards. Here the son is acting as servant, but if it were doubtful, the sessions have drawn the conclusion and have not submitted to us any question whether he was bound by the contract. The question then is, whether this is a contract of hiring and service or of apprenticeship. It certainly cannot be called an apprenticeship, nor bears any of its forms, for although there is mention made of teaching him the business, and an allowance on that account, yet it enters into the contemplation of the parties to almost every contract of hiring and service, whether the servant has learnt his art; and if not, a consideration is made on the rate of wages. It is the mea-

sure to which each party resorts in settling the compensation, and if the circumstance of the servant's having to learn his art is to make a difference, it would change the nature of most hiring and service even in the meanest situations. As to Rex *v.* Little Bolton, without saying whether one quite approves the principle of that case, it is enough to say that the court has been in the habit of acting upon that decision which would make it dangerous to set it aside. I do not say that if that case were erroneous and wholly destitute of legal foundation, it would not be right to set it aside, but if it stands on plausible grounds, it ought not to be canvassed too nicely. This case is stronger than Rex *v.* Little Bolton. There the master agreed to teach the pauper, if he would work with him two years and a half or three years, so that the teaching was of the very essence of the contract. Here there is no express contract by the master to teach, only an allowance by the servant out of the earnings for teaching, which perhaps may amount to an implied one. I will not say that an action might not be maintained upon this contract for not teaching, although upon a demurrer to a declaration framed upon it there might be difficulty; admitting, however, that such a contract may be inferred, it is by no means so clear as assumed in argument, and even if it were it would not be so strong as Rex *v.* Little Bolton, which was an express contract. There Lord Mansfield observed upon the agreement, not speaking of the pauper as an apprentice, and here there is no mention of apprentice except as far as learning and teaching are ingredients in the contract of apprenticeship, which they are in almost every contract of hiring and service regularly entered into. Therefore without saying that Rex *v.* Little Bolton is not law, we cannot hold that this is not a good hiring and service.

Le

Le Blanc, J. The sessions have determined this to be a good hiring and service, and unless the court sees that their conclusion is wrong, we are bound to confirm their order. It is not stated in this case whether the pauper here bound was an adult or infant, it is merely stated he was an unmarried man, having no child. In that situation his father agreed with the master that he should be with him and work for two years, which is all that is stated with respect to the service. The contract is made with another person on his behalf, and he serves under it. That would be evidence under which I should think a jury might infer that he adopted it. The sessions have so inferred, and there is no objection. If that be so, there is no other difference which can be pointed except the names of the parties, the place and trade, to distinguish this from Rex *v.* Little Bolton. It will not convert this contract into an apprenticeship, because the party was desirous of improving himself in the trade in which he was to work, or even stipulated for that purpose. Every workman who contracts for his labour, and is not perfect in his art, is desirous of learning, and it forms an ingredient in such contract. The court must see that somewhat more than an hiring and service was intended. Here it was agreed that the pauper should work, and he did so, and he was to allow so much per week to his master for teaching him. This is the only circumstance which is relied upon to shew it an apprenticeship. The question is, whether that is sufficient to shew that the conclusion drawn by the sessions was wrong; I think not, after the case of Rex *v.* Little Bolton; and even if the case were new, I am not prepared to say that this would give it so much the colour of an apprenticeship as to prevent the settlement. (1)

(1) Rex *v.* Burbach, East. 53 Geo. III. Maule and Selw. MSS.

Immaterial covenants.

The age of the party contracting to serve seems to have formed no ground of distinction in these cases (1), and it is equally immaterial, whether the master is to find diet, washing, and lodging (2), or the party to find himself (3), without wages (4), or that he is to receive wages (5), or to have a portion of his earnings in lieu thereof (6), or that he is to live away from his master at stated intervals (7). Neither does the time for which the engagement is to last seem to have been relied upon. In all the cases cited, both those which have been deemed contracts of apprenticeship, and those which been held contracts of hiring, the time for which the agreement was made was less than that prescribed for the binding of apprentices, either under 5 Eliz. chap. 4. or 43 Eliz. chap. 2.

SECT. III.

Of discharging the Apprentice from his Indentures.

Discharging apprentices.

THE Court of King's Bench has no authority to direct that an apprentice shall be discharged from his indentures (8), but a deed of apprenticeship may he discharged in four ways besides natural efflux of time.

1. By sessions, or two justices.

1st, By application of either party to two justices of peace, or to the court of quarter sessions.

(1) Rex *v.* Burbach, ante. 487.

(2) Rex *v.* Whitechurch, Canonicorum, &c. ante, 450. (4), 476. (1).

(3) Rex *v.* Little Bolton, ante, 482. (1). Rex *v.* Highnam, ante, 480. (1). Rex *v.* Martham, ante, 461. (1).

(4) Rex *v.* Shenfield, 4 East, 546.

(5) Rex *v.* All Saints Hereford' ante, 476. (3). Rex. *v.* Highnam, and the cases ante, n. (3).

(6) Rex *v.* Little Bolton, ante, 482. (1). Rex *v.* Eccleston, ante, 483. (1)

(7) Rex *v.* Portsea, ante, 463. (1).

(8) Ex parte Gill, 7 East, 376.

A more

A more extensive power is given to the sessions than to the justices, and depends upon 5 Eliz. c. 4. s. 35; which enacts, "that if any *such master* shall misuse or evil intreat his apprentice, or that the *said apprentice shall have any* just cause to complain, or the apprentice do not his duty to his master, then the *said master* or *apprentice being grieved*, and having cause to complain, shall repair unto one justice of peace within the said county, or to the mayor, or other head officer of the city, town corporate, market-town, or other place where the said master dwelleth, who shall by his wisdom and discretion take such order and direction between the said master and his apprentice, as the equity of the cause shall require; and if, for want of good conformity in the said master, the said justice of peace, or the said mayor, or other head officer, cannot compound and agree the matter between him and his apprentice, then the said justice, or the said mayor, or other head officer, shall take bond of the said master to appear at the next sessions then to be holden in the said county, or within the said city, town corporate, or market town, to be before the justices of the said county, or the mayor or head officer of the said town-corporate or market-town, if the said master dwell within any such; and upon his appearance, and hearing of the matter before the said justices, or the said mayor, or other head officer, if it be thought meet unto them to discharge the said apprentice of his apprenticehood, that then the said justices, or four of them at the least, whereof one to be of the quorum, or the said mayor or other head officer, with the assent of three other of his brethren, or men of best reputation within the said city, town-corporate or market-town, shall have power by authority hereof, in writing, under their hands and seals, to pronounce and declare, that they have discharged the said apprentice of his apprenticehood, and the cause thereof; and the said writing so being made and enrolled by the clerk of the peace

1. Power of Sessions, 5 Eliz. c. 4. s. 35.

5 Eliz. c. 3.

peace or town-clerk, among the records that he keepeth, shall be a sufficient discharge for the said apprentice against his master, his executors and administrators; the indentures of the said apprenticehood, or any law or custom to the contrary notwithstanding. And if the default shall be found to be in the apprentice, then the said justices, or the said mayor or other head officer, with the assistance aforesaid, shall cause such due correction and punishment to be ministered unto him, as by their wisdom and discretion shall be thought meet."

20 Geo. II. c. 19.

The power given *to two magistrates* over indentures of apprenticeship, is created by 20 Geo. II. c. 19. and confined to parish apprentices, or others where the premium does not exceed five pounds.

Sect. 5.

It enacts, s. 5.—" That it shall and may be lawful to and for two or more such justices, upon any complaint or application by any apprentice put out by the parish, or any other apprentice, upon whose binding out no larger sum than five pounds of lawful British money was paid, touching or concerning any misusage, refusal of necessary provision, cruelty, or other ill-treatment of or toward such apprentice, by his or her master or mistress, to summon such master or mistress to appear before such justices at a reasonable time, to be named in such summons; and such justices shall and may examine into the matter of such complaint; and upon proof thereof, made upon oath, to their satisfaction (whether the master or mistress be present or not, if service of the summons be also upon oath proved), the said justices may discharge such apprentice, by warrant or certificate under their hands and seals; for which warrant or certificate no fees shall be paid."

Sect.

Sect. 4. "That it shall and may be lawful to and for such justices, upon application or complaint made, upon oath, by any master or mistress, against any such apprentice, touching or concerning any misdemeanor, miscarriage, or ill behaviour, in such his or her service (which oath such justices are hereby empowered to administer), to hear, examine, and determine the same, and to punish the offender by commitment to the house of correction, there to remain and be corrected, and held to hard labour for a reasonable time, not exceeding one calendar month, or otherwise by discharging such apprentice, in manner and form before mentioned."

A doubt being started upon sect. 4. whether under the words of the act it was not necessary that the complaint should be verified upon the master's oath, in order to give the magistrate jurisdiction to discharge the apprentice: the court were of opinion that the complaint must be made to the magistrates by the master or mistress, because they alone have an interest in preferring it, and it must be verified upon *oath*, but it need not be on the oath of the master or mistress, who may know nothing of the fact themselves: the complaint may be well founded upon some cause which happened in their absence, to be verified by the oath of one who knows the fact, otherwise unless the fault were committed in the master's presence, he would be without the remedy intended to be given by the legislature. (1)

It has been likewise decided that this act is not repealed by 6 Geo. III. c. 28. sect. 1. which empowers justices, when an apprentice absents himself before his apprenticeship expires, at any time thereafter, whenever he shall be found (so it be within seven years after the expiration of his term), to serve his said master for so long a term

(1) Finley, Jowle, 12 East, 248.

as

as he shall have absconded himself, unless he shall make satisfaction to his master for the loss sustained by his absence (1), the remedy given by this statute to the master for loss of his apprentice's service being cumulative. (2)

Sect. 5.

Sect. 5. "If any person or persons shall think himself, herself, or themselves aggrieved by such determination, order, or warrant of such justice or justices as aforesaid (save and except any order of commitment), he, she, or they may appeal to the next general quarter sessions of the peace to be held for the county, riding, liberty, city, town-corporate, or place where such determination or order shall be made; which said next general quarter sessions is hereby empowered to hear, and finally determine the same; and to give and award such costs to any of the respective persons, appellant or respondent, as the said sessions shall judge reasonable, not exceeding forty shillings; the same to be levied by distress and sale in manner before mentioned."

Appeal to sessions.

Sect. 6.

Sect. 6. "No writ of certiorari, or other process, shall issue, or be issuable, to remove any proceedings whatever, had in pursuance of this act, into any of His Majesty's courts at Westminster." (3)

The provisions of this statute seem clear and distinct,

(1) The justice is to determine what satisfaction shall be made, and if the apprentice shall not give security to make it according to such determination, the justice may commit him to the house of correction for any time not exceeding 3 months. An appeal is given to the next sessions, giving 6 days notice to the justice and the parties, and entering into a recognizance 3 days after the notice, with sufficient surety to try the appeal, &c.

(2) Gray *v.* Cookson, 16 East, 13.

(3) Justices of peace have jurisdiction over apprentices by other statutes, as 6 Geo. III. c. 25., 32 Geo. III. c. 57., 33 Geo. III. c. 55. for which see the Appendix.

and

and have hitherto given rise to few questions respecting its construction.

The following observations relate to the 5th Eliz. c. 4. But these acts being made *in pari materiâ*, it is probable that decisions upon one would be considered as affording an authoritative elucidation of similar doubts arising upon the other.

1. Sessions power extends to all trades.

It was doubted originally, whether the power of discharge given by 5 Eliz. c. 4. was not to be confined to apprentices in trades specifically mentioned in that statute (1). But the law is now settled, that it extends to every description of apprentices. (2)

2. Sessions where master lives.

The statute requires, that the party grieved shall apply to one justice of the peace of the county, or to the mayor, &c. of the city, &c. where the master dwelleth; *and if he cannot compound and agree* the matter between him and the apprentice, he is to bind the master to appear at the next sessions, &c. A power is given, therefore, to the justices and sessions having jurisdiction over the place where the master lives, although the apprentice is bound elsewhere. (3)

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(1) Per Lord Hale, Watkins *v.* Edwards, 1 Vent. 174. 2 Keb. 822. Rex *v.* Gately, 2 Salk. 471. 5 Mod. 159. resolved accordingly. 1 Bott. 572. Pl. 780. Rex *v.* Furness, Cas. Sett. and Rem. 21. S. P.

(2) Rex *v.* Collingbourne, 1 Stra. 663. Rex *v.* Taunton, cited, ib. 575. (c). in marg. Hawksworth *v.* Hilary, 1 Saund. 315.

(3) Rex *v.* Collingbourne, ante, (2). In this case the apprentice was bound in London, to one of the freemen, and the indentures were enrolled there, and the master lived in Middlesex at the time of the complaint. The court said, "they would not take away the "jurisdiction of the mayor's court, "but only give a concurrent jurisdic- "tion to the justices of the peace for "the county." The reporter, Strange, adds, "the words of the statute are "very plain, for they give a juris- "diction to the justices where the "apprentice lives." But the report in Lord Raymond, 1410, gives no support

3. Must be four county justices met in general sessions.

The power of discharge is confined in counties to four justices at the least, one being of the quorum, and they must be assembled at a general sessions. Where four justices discharged an apprentice at a private sesions, the order was set aside (1). In cities, towns corporate, or market-towns, the power is given to the mayor or head officer, with the consent of his brethren or men of best reputation within the place.

4. Sessions have an original jurisdiction.

It has been thought that the legislature intended this power of dissolving the indenture to be exercised rather by way of appeal, after the justice had tried in vain to compound the existing differences, than that the sessions should exercise it in the first instance, upon a direct application (2). But it was afterwards considered that the interference of a private justice was intended only to arbitrate and accommodate the dispute; and it is now settled that the sessions possess an original jurisdiction independent of any such previous application (3). For the statute says, "if he (the justice) cannot compound the matter, he is to take bond for the parties' appearance at the sessions;" so that they are not to take it up by appeal.

5. Master's appearance.

The act requires the discharge to be made "upon the "master's appearance." A master being bound over to the sessions, did not appear, whereupon an order was made discharging his apprentice. It was objected to this order, that, by the terms of the statute, it cannot be made, except upon the master's appearance. But the court held that the act must have a reasonable construction, so as

port to the foregoing dictum. By s. 53 of the act, "the customs of London and Norwich are saved."

(1) Anon. Skin. 98.

(2) See the opinion of Twysden and Rainsford, J. Watkins *v.* Edwards, 1 Mod. 287. Holt, C. J. anon. 1 Salk. 67.

(3) Rex *v.* Johnson, 1 Salk. 68. 2 Salk. 491. Rex *v.* Gill, 1 Str. 143. Rex *v.* Davis, ib. 704. Rex *v.* Heaseman, Cas. Temp. Hardw. 2 Str. 1014. S. C.

not

not to permit the master to take advantage of his own obstinacy. The apprentice's remedy therefore was not confined to proceedings on the recognizance, forfeited by non-appearance; but the sessions might proceed in the master's absence, as otherwise, if he ran away, the apprentice could not be discharged. (1)

6. Summons.

The original application was made in this case to a justice, and the parties being bound over to the sessions, must take notice, and appear without further summons (2). But where the application is in the first instance to the sessions, the party complained against must be summoned, and if he make default, it is equal to an appearance (3). And where the master is complained against, the order must set forth either that he appeared, or that he was summoned and made default, or it will be quashed for the defect. Because, although with respect to orders in general, the court will presume *omnia rite esse acta*; yet that presumption is only in case of orders which do not in express terms require an appearance. But it is otherwise in an act like that of 5 Eliz. c. 4. which gives the justices authority to proceed upon the appearance of the party; so that it is made an essential requisite to found their jurisdiction. (4)

Form of the order.

Order of discharge on whose application.

An order of discharge may be made upon the application of either party; "for an apprentice may be discharged from a bad master, and a bad apprentice from his master (5)." But the sessions cannot discharge without shewing some cause (6), which must be set forth in their order.

(1) Ditton's case, 2 Salk. 491.
(2) Ut videtur per Lee, C. J. Rex v. Amies, 1 Bott, 576. Pl. 787.
(3) Per Probyn, J. Rex v. Amies, ante, (2)
(4) Rex v. Heaseman, 1 Bott, 577. Pl. 788. ante, 494. (3). See Regina v. Rutter, 1 Bott, 574. Pl. 782. Rex v. Gill, 1 Str. 143.
(5) Hawksworth v. Hilary, ante, 493. (2)
(6) Rex v. Heaseman, ante, (4). 2 Str. 1013. Rex v. Davis, ib. 704.

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Ground of complaint.

The usual causes for which the apprentice complains against the master are, cruelty and violating his contract, by neglecting to instruct him, or the like; when the master applies to get quit of his apprentice, it is generally upon the ground of incorrigible misbehaviour.

Grounds of discharge how stated in order.

If an order merely states that the master "misused his apprentice," or that the master "used him unkindly (1)," or that he refused in court to take him again (2), or that he refused to entertain him according to the indentures (3), it does not shew a sufficient ground for the discharge. Neither it is enough that the apprentice has married without his master's consent (4). And there is no power to discharge for sickness, as "where the apprentice was lame, and, in the surgeon's opinion, incurably afflicted with the king's evil," for the master takes him for better or worse, and is to provide for him in sickness and in health. (5)

Discharge for ideocy.

But where a boy who had been put out as a parish apprentice, after three years' service, plainly appeared to be an ideot, incapable of learning his trade, the court confirmed an order of sessions, discharging his master of him. For it would be hard upon the master to keep one who could do him no service, while the parish should go free. (6)

Restitution of fee.

A power of ordering restitution of money given with the apprentice may be exercised, upon discharging him as incident to the jurisdiction. (7)

This

(1) Rex *v.* Heaseman, ante, 495. (4).

(2) Rex *v.* Davis, Str. 774. ante, (3).

(3) Rex *v.* Heaseman, ante, (1).

(4) Stephenson *v.* Holditch, 2 Vern. 491.

(5) Rex *v.* Hales Owen, 1 Str. 99. A further objection was, that the order was not enrolled, see post.

(6) Anon. Skin. 114. See also Rex *v.* Charles, Burr. S. C. 706.

(7) Rex *v.* Johnson, 1 Salk. 68. 2 Salk. 491. Ditton's case, 1 Salk. 67. Duhamel's case, Skin. 108.

This order must be under the hands and seals of four justices (1), and enrolled as the act directs, or the superior court will set it aside. (2)

Order under hand and seal.

No case has occurred in which a pauper's settlement has depended upon the validity of such an order of discharge. The power of a quarter sessions over it, when trying a question of settlement, is therefore undecided. But it may perhaps be concluded from analogy to the proceedings of ecclesiastical (3) revenue (4) and admiralty courts (5), that being a direct judgment upon the fact by a court not only of competent, but exclusive jurisdiction, it is conclusive of the question between contending parishes, although they are not immediately parties to the sentence, unless it has been obtained by fraud (6), or appears altogether void. (7)

Order how far conclusive.

2. Apprenticeship being a personal trust between the master and servant, is determinable by the death

2. Discharge of indentures by death.

2 Bar. Abrid. master and servant. Rex *v.* Amies, ante, 495. (3). In this last case it was objected, that it did not appear that the master had any money with the apprentice; but the order being, "that W. A. do return and pay back the sum, &c." it shall be intended that he received money with him. Rex *v.* Vandeleer, 1 Str. 69. is contra, but the law is now settled as stated in the text.

(1) Anon. Salk. 470. Rex *v.* St. Petrox, Burr. S. C. 248.

(2) Rex *v.* Hales Owen, 1 Str. 99.

(3) Bunting's case, 4 Co. 29. Jones *v.* Bow, Carth, 225. 11 St. Trial, 218. 222. Harvey's case, 11 St. Trial, 285.

(4) Cook *v.* Sholl, 5 Term Rep. 255.

(5) Lothian *v.* Henderson, in Dom. Proc. 3 Bos. and Pull. 499. Bolton *v.* Gladstone, 5 East, 155.

(6) Prudham *v.* Philips, Amb. 762. Dutchess of Kingston's case.

(7) Chichester *v.* Philips, T. Raym. 405. Havelock *v.* Rockwood, 8 Term Rep. 268. Case of the Flad. Oyen, ib. 270. n. a. 1. Robin. Adm. Rep. 135. But the determinations which hold such judgments conclusive, in the case of third persons, relate only to admiralty sentences in prize causes, and seem to have been given with much reluctance. See Lothian *v.* Henderson, ante, (3). And C.J. De Grey's opinion, Dutchess of Kingston's case. 11 St. Trial, 261, 262.

of either (1). But indentures are not cancelled by the master's failure in his business and running away. (2)

3. Of minors bound beyond the legal period.

3. Persons who have been bound to serve beyond the age of twenty-one, may elect to vacate their indentures

(1) Rex *v.* Peck, Salk. 66. Rex. *v.* Eakring, Burr. S. C. 320. But the apprentice and master's representative may continue the relation at their option. See several cases, post. So may a servant, see Rex *v.* Ladock, ante, 416. and the executor is liable upon the testator's covenants, if he have assets. Rex *v.* Peck, ante. But 32 G. 3. c. 57. for the regulation of parish apprentices, recites, that on the death of the master during the term of such apprenticeship, the agreement for service on the part of the apprentice is at an end; but the covenant on the part of the master still continues as far as his assets extend, or doubts have arisen in respect thereto, &c. It then enacts, (sect. 2.) that such covenant for maintenance of parish apprentices with whom no more than 5l. shall be given, shall not continue in force longer than for three calendar months after the death of the master, &c. during which three months the apprentice shall continue to serve the executors or their appointee, and that within such three calendar months, two justices of the county, &c. where the master or mistress shall have died, shall and may, on application by the widow of the master, or husband of the mistress, or by any son, daughter, brother or sister, executor or executrix, administrator or administratrix of such master or mistress, by indorsement on the indenture or counterpart, or by any other instrument in writing, order and direct that such apprentice shall serve as an apprentice any one of such persons applying, (such person having lived with and been part of such master or mistresses family at the time of their death,) as the justices shall think fit, during the residue of the term mentioned in the indenture. By sect. 4. If no application shall be made within three months, or the justices shall not think fit that the apprenticeship shall continue, the indentures shall be at an end in like manner, as they would have been at the expiration of the time therein mentioned. Sect. 5. Provides "that nothing herein before contained shall extend or be construed to extend to any parish apprentice, but to such only as shall be living with, and shall make part of the family, or shall be in the actual employment of such original master or mistress, or of any subsequent master or mistress appointed under and by virtue of the several provisions of this act, at the time of the death of any such masters or mistresses respectively. Upon the construction of this clause, see Rex *v.* Sheepshead, 15 East, 59. post.

(2) Rex *v.* Buckington, 2 Lord Raym. 1352. 1 Str. 582. And the case of a parish apprentice, Rex *v.* Langham, Cald. 126. Rex *v.* Eakring, Burr. S. C. 320. Rex *v.* Chester, ibid. 782.

upon

upon attaining that age, unless bound to serve beyond it under the authority of an act of parliament (1). But the apprentice must regularly declare his intention to do so. For where an infant was bound for six years by indenture, and being of age ran away, alledging he did so with an intent to avoid the apprenticeship, made when he was an infant, and to his prejudice, the court inclined strongly to think that this running away did not avoid them, and that he could not make use of his offence to avoid the punishment that attends it, for it is too late to do it before a justice when charged with a crime (2), and it has been subsequently decided upon the authority of the foregoing case, that voidable indentures are not avoided by the apprentice's act of delinquency in running away from his master. (3)

4. The most usual mode of discharging indentures is by mutual consent. If the apprentice is an infant, his master cannot discharge them by his consent alone (4). But it may be done with his father's (5), or any person having the legal superintendance of his minority.

4. By consent.

Minors.

In the case of a parish apprentice under age, the indenture cannot be discharged by his consent (6), though

Parish apprentices.

(1) Ex parte Mary Anne Davis, 6 Term Rep. 715. The opinion of Aston, J. Rex *v.* Evered, Cald. 26. See also ex parte Gill, 7 East, 376.

(2) Rex *v.* Evered, Cald. 26. S. C. 16 East, 27. But in this case the apprentice was discharged by consent, there being another objection to the commitment. Ashcroft *v.* Bertles, 6 Term Rep. 652. See also Rex *v.* Buckington, ante, 498. (2). But in Rex *v.* Eakring, ante, 498. (1), the apprentice ran away, and the master dying afterwards, the apprenticeship was held to be terminated by the death, so as to entitle the pauper to a settlement by hiring and service. See ex parte Gill, 7 East, 376.

(3) Gray *v.* Cookson, 16 East, 13.

(4) Rex *v.* Austrey, Burr. S. C. 441. Even to enter into the king's service. See Rex *v.* Hindringham, 6 Term Rep. 557.

(5) Rex *v.* St. Mary Kallendar, Burr. S. C. 274. Rex *v.* Weddington, Burr. S. C. 766. Rex *v.* Spawnton, Burr. S. C. 801.

(6) Rex *v.* Austrey, ante, n. (4).

his father concur (1). As he is bound out by the parish officers under a special authority, they ought to be consulted, and give their assent to his discharge, otherwise the whole policy of the 43 Eliz. might be defeated (2). But such assent is unnecessary after he attains the age of twenty-one; at which time the master and apprentice may cancel the indentures by mutual agreement (3). Yet if an attempt be made to cancel them before that time, it is not rendered valid merely by the apprentice's coming of age, but the indentures continue in force, unless the parties enter into a new agreement. (4)

How discharged.

In order to discharge indentures, it is necessary, not only that the parties should agree to separate, but that the indentures should be actually cancelled (5), or given up (6); or at least, something done which the law considers as equivalent.

By whom.

It *seems* as if they must be cancelled by the original master, and that it cannot be done by a third person, whom the apprentice is serving with the consent of the first. (7)

In what manner.

Where the parties have power to consent, the indentures may be discharged. 1st, By formally cancelling

(1) Rex *v.* Langham, Cald. 126.

(2) Per Lord Mansfield, C. J. Rex *v.* Weddington, supra, 499. n. (5), decided in Rex *v.* Langham, supra, 498. n. (2).

(3) Rex *v.* Harberton, 1 Term Rep. 139. Rex *v.* Ecclesal Bierlow, Burr. S. C. 562.

(4) Rex *v.* Austrey, Burr. S. C. 441.

(5) As by drawing a pen through them. Rex *v.* Langham, Cald. 126. Tearing of the names and seals. Rex *v.* Spawnton, Burr. S. C. 801.

(6) Rex *v.* Holy Trinity in the Minories, post. 511. (3). See also post. n. (7), 501. (2).

(7) Rex *v.* Notton, Burr. S. C. 629. Quære tamen, whether the decision imparts so much. For the pauper was a parish apprentice bound until 24 years of age, and the service under which the settlement was obtained, being after the appointee had given up the indentures and long after the pauper had attained 21; the court was of opinion that it was not a service under the indentures. And see Rex *v.* Clapham, Burr. S. C. 266 Rex *v.* Shebbear, 1 East, 73.

them. 2d, By exchange, or mutually delivering them up, and this, either with an indorsement (1), or without; "because the exchange of the indentures amounts, either "in law or in equity, (and they are the same thing in the "case,) to a cancelling of them, and a determination of "the apprenticeship under them." (2)

Lord Mansfield was of opinion, that it would have been more convenient, if the court had never gone further than to inquire whether the indentures have been actually cancelled, or given up. (3)

3d, But apprentices have been held discharged in many instances, although the master has retained the indentures in his custody, and they have existed undefaced.

Rule for ascertaining what is a discharge.

Lord Mansfield has laid down the following general rule, as a clear line to go by in ascertaining whether the indentures are discharged. "Wherever the indenture "is so far made an end of, as to give the apprentice a "remedy at law, it shall be considered as a dissolution "of the apprenticeship; but if it were extended to every "case where a court of equity would relieve, the inquiry "would be endless; and different magistrates, not bred "to the profession, would, when left to decide *secundum* "*discretionem*, breed endless confusion, by frequently, "in the like cases, making very contrary determina-"tions." (4)

Thus, where an apprentice lived with his master till twenty-one, and then made an agreement to give him

(1) St. Petrox *v.* Stoke Fleming, Burr. S. C. 250.

(2) Per Lee, C. J. Rex *v.* St. Mary Kallendar, Burr. S. C. 274. Rex *v.* Titchfield, Burr. S. C. 511.

(3) Rex *v.* Harberton, 1 Term Rep. 139. S. C.; and the court seems to have held that opinion, Rex *v.* Thursley, 6 Mod. 190.

(4) Rex *v.* Harberton, ante, (3).

one guinea to discharge him from his apprenticeship; the master gave him a discharge accordingly, and the pauper hired himself elsewhere. Lord Mansfield, C. J. "I am of opinion, that if the indenture *had not been de-* "*stroyed, but had remained in the master's hands,* the "apprentice would have gained a settlement by a sub- "sequent hiring and service. The master received a "guinea for his apprentice, then at full age, for the "express purpose of vacating the indenture. Why! "could the master, after this, have used the indenture "against the apprentice? So far from it, the appren- "tice might have brought an action against the master "for it."(1)

The father of an apprentice, at his son's request, and with his consent, bought out his time for four guineas, the master giving a receipt, and offering to give up the indentures, which the father did not then take, not thinking it material; the master kept the indenture in custody, uncancelled, until the expiration of the whole time, when he delivered it up. The court were of opinion, that the indentures had been put an end to by the agreement. (2)

Conditional agreement to cancel, insufficient.

But unless the indentures are actually cancelled, or given up, or the master agree unconditionally to do so for a valuable consideration, they must be considered as continuing to subsist.

If the master agrees to cancel them conditionally, they remain in force until the apprentice performs the condition, although he is treated in the interim, as one *sui juris*, uncontroled by the obligation of his indentures.

(1) Rex *v.* Justices of Devonshire, Cald. 32. Yet see Regina *v.* Thursley, 6 Mod. 190. But no consideration given to the master.

(2) Rex *v.* Harberton, ante, 501. (3).

A pauper

A pauper served two years and a half under his indentures to a blacksmith, when his master leaving off business, they agreed verbally, that the pauper should give his master seven pounds for the remainder of his time, the master not wishing to turn him over to any body. The master to keep the indentures till the seven pounds were paid, which was to be discharged from time to time as the pauper could earn and make it convenient to pay it. The pauper afterwards worked with different masters until harvest time, when he served his original master for a month, at his request, receiving harvest wages from him as a labourer, which were deducted from the seven pounds he had agreed to pay his master. The master afterwards recommended the pauper to serve one Cherry a blacksmith, in whose service he continued with his master's knowledge, about twelve months. The court were of opinion, "that the parties did not put an end to the apprenticeship; but on the contrary, the apprentice agreed to pay seven pounds to the master, who was to keep the indentures until that sum was paid, the master all this time keeping a control over the apprentice." The indentures therefore continued in force when he went to serve Cherry, at his master's request, by serving whom, he gained a settlement, not as an hired servant, but by serving him under the indentures of apprenticeship, with the consent of his original master. (1)

Master retaining indentures till 7l. paid.

So, where an apprentice who has assigned to S. proposed to S. two months before the expiration of his apprenticeship, to let him off the remainder of his time, which he at first refused to do. The pauper then offered to give S. a guinea, if he would let him off, which S. agreed to do, and also to give him a new suit of clothes

Agreement to let apprentice off for a guinea and it is not paid.

(1) Rex *v.* Chipping Warden, 8 Term Rep. 108.

when the guinea was paid. The guinea was not paid, nor did S. give the pauper the clothes, nor were the indentures given up or cancelled. The indentures were held to subsist, and that the pauper gained a settlement by subsequent service with a particular master, to whom S. had given a specific consent. (1)

Lastly, a minor was bound for six years, and the indenture voidable, and the master made the following unstamped indorsement on the indenture, signed but not sealed by him: "I agree to cancel this indenture as against I. G. and W. G. his son [the apprentice and plaintiff], provided the said W. G. makes no engagement, or enters into any person's service in the town of Newcastle upon Tyne: in such case this indenture to remain valid, and the present engagement void." W. G. afterwards, within the term, made an engagement in the town of N. by setting up the trade of a woollen-draper for himself. The court were of opinion, that the stipulation against making an engagement, as coupled with the context of entering into any person's service in the town of N., in plain sense imported an engagement of trade or business, and seemed equivalent to a stipulation, that he should neither engage in any business himself, nor be employed in any as servant to another within the town of N.; and consequently that the indenture was unavoided, and the apprentice liable to punishment, under 20 Geo. II. c. 19. s. 4., for absenting himself after such engagement, and before the term in his indentures had expired. (2)

What shall not amount to a cancelling of the indentures.

It is manifest from these cases, that a mere agreement, without valuable consideration, to discharge the apprentice from the obligation of serving his master, does not put an end to the indentures.

(1) Rex *v.* Shebbear, 1 East, 73. (2) Gray *v.* Cookson, 16 East, 13.

An

An apprentice under age met with a press-gang, and entered a volunteer in His Majesty's service with his master's consent. He never returned to his master, but the indentures were not delivered up, nor cancelled. The consent thus given by the master evidently implied that he did not put an end to the indentures, and they continued in force until the expiration of the term. (1)

Service with one who covenants to indemnify the first master.

H. was bound by the parish of Knowstone to J. F. for an estate which he rented in that parish of J. L., who covenanted with F. "that if a second apprentice was bound to him for that estate (which H. was), he the said J. L. and his representatives, would discharge the said J. F. from any expences he might incur thereby." Upon H. being so bound, F. applied to Mrs. L. the widow and representative, of J. L., who took the pauper H., received the parish money with him, and went with him into the parish of Roseash, where he resided with her for three years, when, becoming a cripple, she sent him back to F. and insisted on his receiving the pauper. This F. refused to do, until she promised to pay him all the expences he should be at in taking care of him, and then he put the pauper to live with the pauper's grandmother. The court (2) were of opinion, that the original indenture continued, and was not discharged by any thing stated to have passed between F. and Mrs. L. (3)

(1) Rex *v.* Hindringham, 6 Term Rep. 557. Indeed all the cases in the next section proceed upon this principle.

(2) Lord Mansfield, absent.

(3) Rex *v.* Charles, Burr. S. C. 706. In this latter report, the words given to Aston J. are, "F. having "another apprentice, applies to Mrs. "L. to take him, agreeable to her "covenant; she takes him with his "consent, and takes the parish money, "which, to be sure, looks like an as- "signment, but is not one." It is to be observed further, that the apprentice, being under age, could not have consented to the discharge in either of the foregoing cases.

SECT. IV.

Of the Service.

Of the service.

THE service of an apprentice is required by a different statute, and governed by different rules from those which regulate that of an hired servant.

It has been observed, that "the performance of actual service is not the thing material: it is the residence, the inhabitancy of an apprentice in a town or parish for forty days, that gains the settlement (1)." But although the extent of the service may be immaterial, the apprentice gains no settlement, unless he continues under the controul of his indentures during such residence, liable, not only in law, but in fact, to perform the duties prescribed by his covenants; otherwise, he does not inhabit as an apprentice. This is what seems meant by the term *service*, as applied to apprentices.

Extent of service.

The extent and quality of this service is limited by the covenants of the deed by which he is bound, and it seems immaterial, whether they allow an interruption of service, or exempt the apprentice from his master's controul at stated period. This has not been expressly decided, but the following case, which might have raised the question, was brought before the court:—A father covenanted to find the apprentice meat, drink, and lodging, on every Sunday in the year during the term; and the boy went home every Sunday, and served his master the remaining six days of the week. This point was not stirred, but the apprentice acquired a settlement. (2)

Service

(1) Per Aston, J. Rex *v.* Charles, Burr. S. C. 708.

(2) Rex *v.* Leighton, 4 Term Rep. 732. ante, 466. (2). This case may

Service under indentures may be either, 1. with the original master; 2. with another person by his consent. Service.

It has been observed, by a very learned judge, "that it would perhaps have been better to have confined the power of gaining a settlement to service with the original master (1)," but the law is settled otherwise.

Consent may be given, not only by the original master, but by his executor (2), or even by his widow, before taking out administration. (3) Consent by whom given.

Also the person receiving an apprentice with such consent, may transfer his service to another; for his consent includes that of the original master, and this without the actual knowledge or consent of the first (4), or of his representatives, if he be dead. (5)

But since 32 Geo. III. c. 57. it has been held, that when a parish apprentice served the son of his original mistress to whom she had given up her farm, and continued with him until her death: he could not gain a settlement in another parish by serving another person with the son's consent given after his mother's decease. For that act

may perhaps be rather considered as one of interruption in the service, than of an exception in the contract. As to exceptions in contracts of hiring, see ante, 336. et seq.; and as to interruptions in service under them, ante, 342. et seq. But the words of 3 W. III. c. 11. sect. 6. are, that the servant "shall be hired for a year," and of 8 & 9 W. III. c. 30. that "he shall "continue and abide in the same ser- "vice for one whole year." There are none such in the statutes which respect settlements of apprenticeship.

(1) Per Lord Kenyon, C, J. Rex *v.* Crediton, 1 East, 62.

(2) Rex *v.* St. Paul's Bedford, 6 Term Rep. 452.

(3) If the apprentice also consent. Rex *v.* East Bridgeford, Burr. S. C. 133. But see Rex *v.* Chirk, post. 512. (2).

(4) Rex *v.* Tavistock, Burr. S. C. 578. Rex *v.* East Bridgeford, ante, (3). Rex *v.* Bradstone, 2 Bott. 434. Pl. 459.

(5) Rex v. Clapham, Burr. S. C. 266. Per Lord Ellenborough, C. J. Rex *v.* Sheepshead, 15 East, 59.

recites

recites that the contract of service is at an end upon the mistresses death, and service by which a settlement is to be acquired according to sect. 5. means service with a a subsequent master or mistress who becomes so by the provisions of the act; it is the service under the authorized substitution that the act applies to. (1)

This power of assent is an independent right, vested in the person whom the apprentice is legally serving; which he may exercise without any other concurrence than that of the apprentice, and which the latter may give, although under age (2), or bound out by the parish (3). But which, if once given, the master cannot afterwards recal. (4)

What consent sufficient.

It is not every consent to service with a third person which enables an apprentice to acquire a settlement. The distinction is laid down in a recent case: "If the master "is applied to for his consent to a particular service, and "give it, that shall be considered as a service with the "first master, and confers a settlement, but an indiscri- "minate leave to serve any person will not." (5)

Rules for consent to serve third person.

To gain a settlement therefore by service with a third person. 1st, The consent must be direct and explicit. 2d, To serve a particular person; or 3d, if more general, it must be for the immediate benefit of the master. 4th,

(1) Rex *v.* Sheepshead, 15 East, 59. See the provisions of this act abridged, ante, 498. (1), and the act at large in the appendix.

(2) Rex *v.* Fremington, Burr. S.C. 416. Rex *v.* Bradninch, 2 Bott, 430. Pl. 456. and indeed almost all the cases of consent.

(3) Rex *v.* Tavistock, post. 443. (1). Rex *v.* St. George's Hanover Square, post. 510. (4). Rex *v.* Langham, ante, 500. (1).

(4) Per Holt, C. J. Barber *v.* Dennis, 6 Mod. 69. But this seems to extend only to cases where the licence is express, and it may be otherwise limited by the master. See the opinion of Buller J. Rex *v.* Holy Trinity in the Minories, post, 511. (3). Gray *v.* Cookson, ante, 500. (2).

(5) Per Lord Kenyon, Rex *v.* Shebbear, 1 East, 75.

It

It must be given by the master under a conviction, that the indentures are still in force.

An explicit consent may be given. 1st, By assignment in writing. 2d, By parol. 1. Explicit consent how given.

An assignment, however formal, is good by way of covenant, but not as an assignment to pass the master's interest, without a local custom to support it (1), and the defect is not cured by the apprentice's consent (2), because the person of a man is not strictly and legally assignable (3). But it is sufficient to legalize the service under it, and thereby confer a settlement (4), although the original indenture is voidable (5). This assignment, when in writing, must be stamped, for it is not within the exception 20 Geo. III. c. 58. s. 4. which exempts "any memorandum or agreement for the hire of any labourer, artificer, manufacturer, or menial servant." (6) 1. Written assignment. Written assignments stamped.

2d, An unwritten consent to the service is equally good (7), and may be either express or implied; and it seems good when the master agrees that his apprentice shall work for another for a certain sum to be paid the 2. Parol.

(1) Dalt. 658. Caistor *v.* Eccles, 1 Salk. 681. Baxter *v.* Burfield. Herns *v.* Drake, 8 Ann. cited Ld. Raym. 683. Ib. by Lee, C.J. But see the opinion of Buller, J. Master *v.* Miller, 4 Term Rep. 341. who cites Rex *v.* Aicles, 12 Mod. 554.

(2) Rex *v.* Channel, 3 Keb. 519.

(3) Rex *v.* East Bridgeford, Burr. S. C. 133.

(4) Caistor *v.* Eccles, 1 Ld. Raym. 683. Holy Trinity *v.* Shoreditch, 1 Str. 10. Rex *v.* Petham, Burr. S.C. 154.

(5) St. Petrox *v.* Stoke Fleming, Burr. S. C. 248. Where a female was bound out by the parish, and the defect in the original indentures was, that the girl had been bound absolutely till twenty-one, without the alternative "or time of her marriage," see ante.

(6) Rex *v.* St. Paul's Bedford, ante, 507. (2). See also 44 Geo. III. c. 98. ante. 459.

(7) St. Olaves *v.* All Hallows, 8 Mod. 164. Str. 334. Rex *v.* St. George's Hanover Square, Burr. S.C. 12. Rex *v.* Stockland, Cald. 60. Dougl. 70., and other cases, post.

master

master without consulting the apprentice, at least if the apprentice lives and works with such person in pursuance thereof. (1)

Express consent.

1st, A master told his apprentice, "that he had no "business for her, and that she should go where she "would;" afterwards, meeting Mr. N. a relation, who wanted a maid servant, he told him, "he was over-"stocked with maids, and had an apprentice maid, which "he could spare him, if N. and she could agree about "terms." He afterwards told the apprentice, that she might go to Mr. N. and live with Mr. N. if they could agree, and she did so (2). A person willing to take into his service one who was an apprentice at the time, went to the master, who had failed in circumstances, to ask him whether he was willing to resign up his apprentice; and further said, "if things come about again, he hoped "he would never fetch her (the apprentice) again;" to which the master replied, "he never would (3)." These are express consents.

Implied consent.

2d, A direct consent may be inferred, where the words used do not appear. A master hired out his apprentice to a third person by parol agreement, receiving her wages, and finding her in clothes (4). The assignee of an apprentice placed him out with a third person *as an apprentice* (5). An apprentice having staid out all night, was told she might go look for another place, and a week afterwards she agreed to hire herself as a servant, when her first master gave her a character (6). These amount to sufficient consents to the particular service.

(1) Rex *v.* Smerden, 13 East, 452.

(2) Rex *v.* Fremington, Burr. S. C. 416. ante, 508. (2).

(3) Rex *v.* Langham, Cald. 126. ante, 498. (2).

(4) Rex *v.* St. George's Hanover Square, Burr. S. C. 12. But see Reg. *v.* Thursley, 1 Bott, 523. Pl. 705.

(5) Rex *v.* Clapham, Burr. S.C. 266. ante, 507. (5).

(6) Rex *v.* St. Mary Lambeth, 2 Bott, 431. Pl. 457.

Knowledge of service insufficient.

But mere knowledge by the original master, that his apprentice is living in service with another person, does not (1). The pauper was bound as a parish apprentice to Matthews: he assigned her by parol to Stilliford. Having lived with him seven months, she ran away, and served one Hayes for nine months, with the knowledge, but without any express consent of Matthews or Stilliford. Hayes did not know she was an apprentice. Matthews, the original master, resided in the same parish where the pauper served Hayes, and frequently saw her there, but during her residence there, applied to Stilliford to take her back, and threatened to put him to trouble if he did not. Lord Mansfield:—Here is no consent express, or implied; his mere knowledge of it does not imply his consent to it (2). Per Buller J.—All the cases shew, that mere knowledge is not sufficient; knowledge does not imply consent. (3)

General consent.

General consent is rather to be considered as a renunciation and abandonment of the apprentice's service, expressed under the form of an indiscriminate leave, which sets the apprentice at liberty to work with other masters, than as a direct assent to service with other persons. But a master may give his servant a licence to work indiscriminately, without limiting him to a particular individual, and yet it shall not come within the meaning of such a general consent as precludes a settlement. For such service may be *quà* actual service to the master himself, if it be for his benefit, and he retains a direct controul over the apprentice. (4)

(1) Per Lee, C. J. Rex *v.* St. Mary Kallendar, Burr. S. C. 274. Per Buller, J. Rex *v.* Holy Trinity in the Minories, post. 514. (1).

(2) Rex *v.* Ideford, Burr. S. C. 821.

(3) Rex *v.* Holy Trinity in the Minories, post. 514. (1); and see the opinion of Buller, J. Rex *v.* Standford 1 Term Rep. 281. post,; as also Rex *v.* St. Mary Lambeth, 2 Bott, 431. Pl. 457. The facts in both these cases would have raised the question, but it passed unnoticed, both at the bar, and upon the bench. See also the opinion of Lord Kenyon, C. J. Rex *v.* Shebbeare, ante, 505. (1).

(4) Rex *v.* Offerton, post.

But

Consents which give no settlement.

But where the master tells his apprentice "to go about "his business, and work for himself (1), that he must "not stay; he was at liberty to go where he thought "proper (2)." Or that he had no employment for him; he might go where he pleased (3), or an agreement, that the apprentice shall work and provide for himself (4). These are general consents, under which, service with a third person confers no settlement. For the service cannot be considered as performed with the first master, he having expressly renounced it, and the conversations do not amount to a discharge of the indentures, so as to enable the apprentice to make a new contract of service with another person.

General discharge.

Thus, where the master of a parish apprentice, without the parish officer's consent, agreed, in consideration of forty shillings, paid by the apprentice, who was then a minor, to discharge him from his apprenticeship, and delivered up his indentures, and the apprentice afterwards hired himself to several masters. It was held, that the indentures continued; for the pauper being under age, was incapable of consenting to the discharge; and the subsequent service under the hirings can never be considered as performed with the master's consent, and so, as being a service under the indentures; for it was no express consent given to the particular service, but was intended to be quite general, and even founded on a mistaken apprehension, that the pauper could consent to his being discharged. (5)

So where a master told his apprentice "to go about his business, and work for himself," and the indentures

(1) St. Luke's *v.* St. Leonard's, post. 513. (1).

(2) Rex *v.* Chirk, Burr. S. C. 782. Rex *v.* Eakring, Burr. S. C. 320.

(3) Rex *v.* Crediton, post. Notton *v.* Royston, ante, 500. (7).

(4) Rex *v.* St. Helen, Stonegate, 1 East, 285.

(5) Rex *v.* Austrey, Burr. S. C. 441. ante, 499. (4).

were

were not cancelled or given up. The pauper hired himself with several masters as a journeyman, and applied his earnings to his own use. His original master, not knowing with whom he worked after he left him, nor demanding any account of his earnings, nor making any inquiry after him, or any provision for him. It was held, that he gained no settlement by service as an apprentice, by this general leave; nor as an hired servant, for the indentures subsisting, he was not *sui juris.* (1)

Likewise, where the master of an apprentice died, and he continued with the widow in W. for a fortnight to finish his work. Having no employment afterwards for him, or any other workman, she told him that he must not stay with her, and he was at liberty to go where he thought proper. He quitted her, and, on parting, told her he was going to his father, who was a slater, and lived in another parish. But no agreement took place between the father and her, to his knowledge, nor were the indentures delivered up. He lived with his father for two or three years. It was held that he was settled in W. He gained no settlement by residing with his father. "The widow does not appear to have had any "interest: no administration appears to have been taken "out." (2)

A particular consent is most naturally given before the commencement of the new service (3), and previous to a general licence or consent. It has never been expressly decided, whether a consent, subsequent to the commence-

Consent to particular service.

(1) St. Luke's *v.* St. Leonard's, Burr. S. C. 542. See also Notton *v.* Royston, Burr. S. C. 629. ante, 500. (6). In this case, the apprentice being desirous to leave the master whom he served, with leave from his original mistress, applied to him, and the master answered, "he might go where he pleased."

(2) Rex *v.* Chirk, Burr. S. C. 782. also Rex *v.* Eakring, Burr. S. C. 320. Rex *v.* East Bridgeford, ante, 507. (3).

(3) See the cases, ante, p. 509. et seq.

ment of a service, under these circumstances, would render it sufficient, according to the maxim, *Quod omnis ratihabitio retrotrahitur atque mandato æqui paratur.*

After general licence.

But it may be given after a general licence of departure, and after the apprentice has commenced service under such a licence; for the indentures continuing to subsist, the master has a right to resume his controul and claim service from his apprentice for the remainder of his time (1); a subsequent service of forty days, therefore, is under the indentures, and confers a settlement. This has been decided in several cases.

Assent given by "you are "welcome "to keep "my ap- "prentice, "&c."

A parish apprentice being regularly assigned to W. served him till he was twenty years of age, when they agreed to part, and W. gave him permission in writing, signifying that he had his consent to serve any other master. The apprentice then hired himself for a year to T., and when he had been eight months in the service, his master T. met W. by accident, who said, "I find you "have an apprentice of mine;" to which the master answered, "I do not know I have; and then W. said, "J. D. (the pauper) is my apprentice, but you are wel- "come to keep him as long as you please, and may have "his indentures when you please; for I shall think no "more of him." He gained a settlement under this consent. (2)

"You may "go to B. "with all

A pauper, two months previous to the expiration of his apprenticeship, had agreed with S. his master, to

(1) See the opinion of Buller, J. Rex *v.* Holy Trinity in the Minories, 3 Term Rep. 603.

(2) Rex *v.* Bradstone, 2 Bott, 434. Pl. 459. The case ted, that W. had never given any ticular consent to this service with T., or to his serving any particular person, but he told him at parting, that he would think no more of him. See also Rex *v.* the Holy Trinity in the Minories, post. 517. (1).

cancel

cancel the indentures, upon a condition which did not take effect; and the indentures were neither cancelled nor given up. On the morning upon which the agreement was concluded, the pauper went to B. and offered to serve him, who said, he would not take him without the consent of S. The pauper went to S. and told him what B. had said. S. replied, "you may go, with all my "heart; I think it will be a good thing for you to learn "the trade." This was held a sufficient assent by S. to the service with B. to enable the pauper to acquire a settlement as an apprentice. For the master was applied to for his consent to let him serve the particular person named, and he expressed his approbation of that person so named; it is therefore a particular consent to the particular service. (1)

"my heart; "it will be "a good "thing for "you."

An apprentice was bound to serve till twenty-four, and at the age of twenty-two, his master agreed, that if he would give him a guinea in hand, and two guineas more, being one guinea a year during the continuance of his apprenticeship, he should go and serve whom he pleased. But the master said he would not deliver the indentures, nor discharge him from his apprenticeship, for he considered him as his apprentice still. The pauper agreed, and paid his master a guinea in hand, and then hired himself to Miss Sainthill. At the end of the first year, he went to his master, and paid him one guinea for that year. His master said, "you continue to work "with Miss S. I think it a very good place, and hope "you will continue in it." At the end of the second year, he went and paid his master the other guinea, when he said, "you still continue to work with Miss S." He replied, "he did;" when his master said, he would look out for the indenture, and give it to him. The

Approbation after a general licence to depart.

(1) Rex *v.* Shebbear, 1 East, 73. ante, 504. (1).

pauper did not know that there was any conversation between the master and Miss S. respecting the apprenticeship; but Miss S. knew he was an apprentice, *and had inquired his character.* This was held a sufficient assent to entitle the party to a settlement by service with Miss S. as an apprentice. (1)

A parish apprentice, under age, was assigned to one *Prout.* Afterwards he offered his service to *Mason*, who apprehending that he was an apprentice, sent to Prout to know whether it was with his consent that the pauper should live with him: to which he answered, "with all "my heart; he may live with Mason, or any body else, "provided he performs his agreement with me; which "was, *to pay one guinea a year during the remainder of* "*his apprenticeship.*" This was held a consent by *Prout*, and his consent included that of the first master. (2)

Service with a second master two months before indentures cancelled.

The pauper was bound apprentice to serve seven years. Having served six, and being only nineteen, the master declined business, when he informed the pauper, that he wished him to get another master for his good. The pauper went to his father, in another parish, with whom he staid three or four weeks. Not meeting with a service, he returned to his master, who told him, that he heard Mr. E. wanted a man, and to go to E. and make an agreement with him for his (the pauper's) good; and that he understood E. would take him for a twelvemonth. The pauper went, and entered into an agreement, in writing, under seal, but without stamp, to serve for a year; to have board, lodging, and twelve pounds wages. The indentures were neither assigned, nor cancelled; but after he had served E. two months, his first master gave him up his indentures. The service with E. is by

(1) Rex v. Bradninch, 2 Bott, 430. Pl. 456.

(2) Rex v. Tavistock, Burr. S. C. 578.

the

the first master's recommendation, and with his consent, and the indentures not being given up for forty days, it was a service under them, and conferred a settlement. (1)

In these cases, the leave was expressly given. In some others there was an application to obtain it, while the master seems in the remainder not only to have preserved his control over the apprentice, but to have exercised it with a solicitude for his welfare. But the great difficulty is, to distinguish in cases where a general licence has been originally given, between express consent, which legalizes subsequent service, and such mere knowledge, that the apprentice is in a particular service, as does not amount to consent. (2)

Cases of knowledge of service, without consent.

The following were considered as cases of knowledge and acquiescence, on the master's part, without consent:—

The master of an apprentice failing in business, told him he had no further employment for him, and he might go where he pleased. Afterwards, and before leaving his master, a person came to inform the apprentice, that one Underhill, who wanted a boy, was at an inn in the neighbourhood, and that he should go to the inn. As the apprentice was going out of the house, his master met him, and asked him where he was going? the pauper told him he was going down to Underhill. The master said, "he might go there, or where he "pleased." Thereupon, the apprentice left his house, and went and hired himself, and lived with Underhill; but no communication took place between the original master and him. This is not such an assent of the ori-

(1) Rex *v.* Holy Trinity in the Minories, 3 Term Rep. 605.

(2) See ante, 510—511.

ginal master to serve with the second, as enables him to gain a settlement thereby. For the pauper tells his master, on being asked where he was going, that he is going to Underhill: on which the master repeats, in effect, what he had before said, that he might go there, or where he pleased; meaning, that he no longer looked for his service, nor took any concern how he disposed of himself. (1)

I have got your apprentice to work. "I "am glad "of it, he "was a bad "lad, &c."

An apprentice was assigned, by parol, to his brother, W. Chapman, a journeyman bricklayer. Being about to marry, he applied to W. Chapman, and told him he wished to work, and provide for himself, to which W. C. consented, and said, he might do the best he could for himself, and did not afterwards consider the pauper as his apprentice. But the indenture was neither delivered up, nor cancelled, nor any thing said respecting it. In the same month, and three quarters of a year before the expiration of the apprenticeship, the pauper applied for work to T. Penyston, who employed him in bricklayer's work, at weekly wages. About a month after, T. P. met W. C. and told him he had got his brother at work; to which W. C. replied, "I am glad of it; he was a bad "lad, and I could make nothing of him." This was held not to amount to an assent to the service with the second master, upon the authority of the foregoing case. (2)

Assent where master derives benefit from subsequent service.

It has been held, that the master may assent to the apprentice's working for himself, provided he is to derive a benefit from that service, and his control continues; because, in that case, it is actual service done for the master. A parish apprentice, eighteen years old, agreed with his master, "that he, upon paying twelve-

(1) Rex *v.* Crediton, 1 East, 59. ante, 512.

(2) Rex *v.* St. Helen, Stonegate, 1 East, 285.

" pence a week, and providing for himself, should be at " liberty to work for his own benefit, during the re- " mainder of his apprenticeship." The master was to find him a loom, and was to " receive the twelve-pence " a week as a satisfaction for his service during the re- " mainder of his apprenticeship." Neither the church-wardens nor overseers were privy to the agreement, nor were the indentures cancelled, or delivered up. The pauper then married, and worked for his own benefit, his master providing him with a loom, and receiving the one shilling *per* week. He worked during the last year at Offerton, for the same tradesman who employed his master; but such tradesman did not settle, nor in any wise account with the master for the pauper's work, or earnings: nor did he work with him by the master's particular direction or consent; but the master provided him with a loom, and knew, during all that time, where and with whom he was working; and applied to him twice during the last year of his apprenticeship, for the arrears of the twelve-pence *per* week, due in pursuance of the agreement, which he would have received, if the pauper had been able to pay. The court were of opinion, " that the apprenticeship continued; that there was no dissolution of it, nor any intention to dissolve it; as between the original master and the apprentice, the master knew that the apprentice worked at Offerton, and demanded the twelve-pence a week for it. An apprentice may work in any parish, with the consent of his master; and it is probable, that the tradesman with whom he worked knew that he was an apprentice, as he employed the master. They held, therefore, that the service in Offerton was under the indentures of apprenticeship. (1)

(1) Rex *v.* Offerton, Burr. S. C. 802.

4. Consent must be by master as such.

The consent must also be given by the master as such, and while he conceives the indentures to continue in force (1). For if the parties suppose, even erroneously, that the indentures are cancelled, service with a third person, although under an express consent, will be insufficient. The pauper was bound by the parish officers, at the age of eleven, to E. S. to serve till twenty-four. He lived with E. S. five years, when his master gave him up his indentures, and recommended him to live with W. V., with whom he made an agreement, as a servant, and served three years. Here "the pauper "being a minor, could not consent to the discharge of "the indentures, without the consent of the parish "officers." (2)

And, *per* Lord Mansfield, C. J. "It seems to me clear, that the pauper could not gain a settlement after the first five years, under the indentures, as an apprentice; because neither party, in fact, considered the service as such; they considered the indentures as given up, and put an end to for ever; so that the service was not, nor was intended to be, in the capacity of an apprentice." (3)

The pauper having been regularly bound out by her parish; the master, during her term, by a written indenture legally stamped, signed and sealed by all parties, in consideration of 5l. 5s., bound her with her own con-

(1) Per Le Blanc J. Rex *v.* Christowe, 11 East, 95.

(2) Per Willes, J. post. (3).

(3) Rex *v.* Sandford, 1 Term Rep. 281. Buller, J. puts the settlement on the ground "that it was a mere recommendation to serve W. V., which the pauper might have rejected or not, as he pleased." But the opinion of Lord Mansfield, C. J. Rex *v.* Austrey, ante, 512. (3), confirms this case. And in Rex *v.* Holy Trinity in the Minories, ante, 517. (1), Lord Kenyon, C. J. distinguished that case, where the parties had power to cancel, from Rex *v.* Sandford, by resting the settlement upon the residence of two months previous to giving up the indentures.

sent

sent to one S. as an apprentice, till she attained the full age of 21 years. The court were of opinion, that she did not acquire a settlement by her service with S. under the second indenture: for the instrument purports to be a new and original binding. Her first master does not assume any right to assent to her serving another master under the former indenture, but only to bind her *de novo*. To contend that this was a consent on her part, that she should serve S. as a continuation of the relation of her original apprenticeship, would be contrary to what appears upon the face of the instrument to have been the intention of the contracting parties. (1)

Circumstances which do not affect the licence to work with another master.

But no distinction arises from the parties having it in contemplation to give up the indentures (2), or the apprentice entering into a new relation of servitude, either by binding himself as an apprentice (3), or servant (4), although he does it with the master's knowledge, and under seal (5), or that the person, receiving him, knows him to be an apprentice (6). It is also unnecessary, in cases of particular consent, that the first master should derive any benefit from the service under it. (7)

SECT. V.

Of the Residence by, and Place in, which an Apprentice acquires a Settlement.

Distinction between residence as an

A servant cannot gain a settlement until his year of service is complete. It floats undetermined until that

(1) Rex *v.* Christowe, 11 East, 95.
(2) Rex *v.* Holy Trinity in the Minories, ante, 517. (1).
(3) St. Petrox *v.* Stoke Fleming, ante, 509. (5).
(4) Rex *v.* St. Mary, Lambeth, ante, 510. (5).
(5) Ante, n. (2).
(6) Rex *v.* Bradninch, ante, 516. (1).
(7) Rex *v.* Fremington, ante, 510. (1). Rex *v.* Holy Trinity in the Minories, ante, (2).

expires,

apprentice, and servant.

expires, and he is then settled in that parish or town wherein he has served the last forty days, capable of conferring a settlement. (1)

But forty days' residence and service under indentures confer an absolute settlement, which no subsequent disqualification by certificate, or otherwise, can defeat (2). If the apprentice reside so long in one parish, although the indentures are cancelled on the forty-first day after their execution, he has acquired a settlement. (3)

It is rightly observed by Dr. Burn, therefore, "that "an apprentice may gain as many settlements as there "are spaces of forty days in the term of his apprentice-"ship." (4)

This is the principal distinction between residence as a servant, and as an apprentice.

Arrangement.

The questions and cases which respect this subject will be arranged therefore in the same order as was pursued in treating of the residence of hired servants. The reader will find in the section on that subject (5) a minute explication of the principles, which it would be useless and irksome to repeat here.

Settlement in parish or town.

An apprentice cannot acquire a settlement except in a parish or township having overseers (6); for the 13 & 14

(1) Ante, 420. et seq.

(2) See Rex *v.* Clifthydon, Burr. S. C. 161. St. Cuthbert's *v.* Westbury, Burr. S. C. 470.

(3) A servant may acquire a settlement by a residence of 40 days, directly subsequent to his year's hiring, but he must have served an entire year.

(4) 3 Burn's Justice, Title Poor, Settlement by apprenticeship.

(5) Ante, chap. xx. sect. v. p. 418.

(6) Clerkenwell *v.* Bridewell, 1 Lord Raym. 549. Rex *v.* Cirencester, 1 Str. 579. St. Mary Colechurch *v.* Radcliffe, 1 Str. 60. post. 525. (1).

Car. II. c. 12. extends only to such places, and the provisions of 3 W. & M. are expressly confined thereto.

He must reside forty days in the character of apprentice, and free from incapacity to acquire a settlement. (1)

Reside 40 days.

But it is unnecessary that the days should run in unbroken succession. A residence at intervals will connect for the purpose. (2)

Of connecting services.

Neither does it make any distinction, that the residence is interrupted by periods of inhabitancy in a place where no settlement can be acquired. An apprentice "served his master mostly on ship-board at sea, but inhabited the parish of West Stockwith the first fourteen days of his apprenticeship, and so many days after, at many different times, as, with those fourteen days, amounted to upwards of forty days in the whole, and in no other parish for forty days during his apprenticeship." He was held settled in West Stockwith. (3)

When inhabitancy in a place where no settlement is gained.

And the rule is the same where the incapacity arises, not from the place, but from a defect in the service. Residence at any distance of time during the continuance of indentures will connect, notwithstanding the intervention of service and residence, which confer no settlement, provided the relation of master and apprentice continues to subsist.

When intervals of service, by which no settlement gained.

(1) St. Cuthbert's *v.* Westbury, Burr. S. C. 470. Missenden *v.* Grimsfield, Fol. 157. But the ground of this latter determination was, that the agreement to reside alternately was fraudulent.

(2) Rex *v.* Sandford, 2 Bott, 398. Pl. 426. Rex *v.* Brighthelmstone, 5 Term Rep. 188. Rex *v.* Cirencester, Cas. Sett. and Rem. 119. Rex *v.* St. George's Hanover Square, ante, 510. (3). Rex *v.* Fremington, ante, 510. (1), seems contra; the law, however, is settled by the subsequent cases as above cited.

(3) Rex *v.* Gainsborough, Burr. S. C. 586.

Sage

Sage gave up the indentures to his parish apprentice, then aged eighteen, without the parish officer's consent, and recommended him to live with Verney, with whom the pauper made an agreement as a servant for three years. Having served that time, he resided in another place for three months, and then returned to his original master for a month, paying him sixpence a week for lodging. Willes and Buller J. were of opinion, that this last residence would connect with that which took place antecedently in the parish with the same master, prior to giving up the indentures, so as to confer a settlement. (1)

Settled where sleeps last night.

The settlement of an apprentice, like that of a servant, is where he has last resided forty complete days. He is settled finally, therefore, where he sleeps the last night, in his condition of an apprentice, provided he has resided there forty days altogether. (2)

Working without inhabitancy, insufficient.

Likewise, if the apprentice serve his master in one parish, and reside in another, the settlement is gained, not where he works, but where he sleeps; for it is there that he inhabits: and one condition for gaining a settlement required by 3 W. & M. c. 11. s. 8. is, that the person shall be bound an apprentice, and *inhabit* in the town or parish. (3)

(1) Rex *v.* Sandford, 1 Term Rep. 281. In the first of these reports a mistake occurs in printing the name of Verney for Sage. See also Rex *v.* Charles, Burr. S. C. 706.

(2) Rex *v.* Brighthelmstone, and the cases supra, 523. (2).

(3) Rex *v.* St. Peter's on the Hill, 2 Bott, 393. Pl. 422. The opinion of Parker, C. J. and Pratt, J. in St. Mary Colechurch *v.* Ratcliffe, post. 525.(1), and that of the chief justice in Rex *v.* St. Olave's, is contra. But the opinions were extra-judicial, and the law is now settled otherwise. Rex *v.* Spotland, Burr. S. C. 527. These cases decide, that the settlement is where the apprentice sleeps; but it was ruled in several prior cases, that service, without residence, gave no settlement. See Rex *v.* St. Olave's Jewry, 2 Bott, 390. Pl. 417. St. Mary Colechurch *v.* Ratcliffe, Ibid. 391. Pl. 418. St. John Baptist, and St. James, Ib. 390. Pl. 420.

This

This rule obtains, although the apprentice should be deprived of a settlement under his indentures, by adhering thereto. An apprentice to a sea-captain serving his master every day on shore, and sleeping every night on board a ship, then lying in an extraparochial place, gains no settlement under his indentures. (1)

Neither is the master's permission to sleep in the particular parish necessary. An apprentice married during his apprenticeship, and afterwards worked, and dieted in the day-time with his master in the parish of C. (where the master lived, and carried on his trade). The master knew of the marriage, and that his apprentice lodged at nights with his wife at her father's in the parish of H. but the master was not asked, nor did he give him leave to do so; but he knew of it. The pauper was held settled at H.; the place where an apprentice lies being that of his settlement. (2)

Master's consent unnecessary.

And, if we may conclude from analogy to the case of a servant, the master's knowledge of the fact seems as immaterial as his consent (3), provided the apprentice continues under his master's control. (4)

It makes no difference, likewise, whether he inhabits on land or on ship-board, if the place in which the vessel lies is within a town or parish (5), or whether the master has gained a settlement in the place, or lives as a housekeeper, or merely sojourns with one (6); or whe-

Mode of inhabiting, and master's condition immaterial.

(1) St. Mary Colechurch *v.* Ratcliffe, 1 Str. 60. Cas. Sett. 105.

(2) Rex *v.* Castleton, Burr. S. C. 569. Contra, where the pauper's master was certificated to the parish in which he slept, and the certificate not abandoned. Rex *v.* Spotland, Burr. S. C. 527.

(3) Ante, 423.

(4) See Rex *v.* Smarden, 13 East, 452.

(5) Rex *v.* Burton Bradstock, Burr. S. C. 531. Rex *v.* Topsham, 7 East, 466.

(6) Stoke Flemming *v.* Berry Pomroy, 2 Bott, 392. Pl. 421.

ther

ther he goes there for a temporary purpose (1), or does not reside in the parish at all (2), or is without settlement there. (3)

Except servant reside from illness away from his master.

But the court has taken the same distinction in the case of apprentices, as was done in that of servants, viz. that if an apprentice live apart from his master through illness, he is not settled where he resides, but where he had previously dwelt the last forty days under his indentures. (4)

An apprentice had slept more than forty nights of his apprenticeship at Selby, but slept the last night at B. at his grandmother's, in which place he had before slept more than forty nights, with his master's consent, in consequence of his being ill of a fever, and he never slept in B. except as above stated. The court were of opinion, that the residence in B. being on account of illness, was not residence as an apprentice; and that 3 W. III. c. 11. which directs, that if any person shall be bound an apprentice, and inhabit in any parish, *such binding and inhabitation* shall be adjudged a good settlement, &c. must be understood of an inhabitation referable in some way to the apprenticeship. But that the residence here with the grandmother was no more referable to the apprenticeship than if the pauper had resided in an hospital or prison. (5)

He acquires one, however, in such parish if he performs any service for his master, either there or elsewhere, during his residence there.

An apprentice served his master twelve months, when being afflicted with the scrofula he left him and went to

(1) Rex *v.* Charles, post. 527. (2).

(2) Rex *v.* Castleton, ante, 525. (2), and the cases, ib. Rex *v.* Topsham, ante, 525. (5), Rex *v.* St. George's Hanover Square, Burr, S. C. 12.

(3) Stoke Fleming *v.* Berry Pomroy, ante, 525. (6)

(4) Rex *v.* Titchfield, Burr. S. C. 511. As to servants, see ante, 424.

(5) Rex *v.* Barmby in the Marsh, 7 East, 381.

live

live at his mother's in the adjoining parish, and slept there more than 40 days, during which time he went almost every day to his master's, and was sometimes employed by him three or four hours a-day, and was always ready at his master's house when wanted, but was unable to work at his trade. His service with the master continued while he resided with his mother, and therefore he gained a settlement by residence the last forty days in that parish where he lodged with her. (1)

Otherwise if resident with him.

It seems, however, that an apprentice, being an incurable cripple, who resides in the same parish with his master, being put out there by him, will gain a settlement thereby. The pauper was bound apprentice by the parish to F., who applied to Mrs. L. his landlady to take the pauper, in consequence of a covenant in his lease. Mrs. L. did so, received the parish money, and took the pauper into the parish of Roseash, where she then lived, and where he resided with her for three years. In consequence of his becoming a cripple, Mrs. L. insisted upon F.'s taking him back, which he refused to do, unless she agreed to pay him all the expences he should be at in taking care of him. Having agreed to do so, F. put him out to live with the apprentice's grandmother, in F.'s own parish of Knowstone, at so much a-week, and he resided there forty days. The court held, that the indentures not being discharged, he acquired a settlement under this residence in Knowstone, thereby superseding a prior settlement, gained by service, under his indentures, with Mrs. L. in the parish of Roseash; for the performance of service is not the material thing, and this residence cannot be deemed casual. (2)

The

(1) Rex *v.* Stratford-upon-Avon, 11 East, 176.

(2) Rex *v.* Charles, Burr. S. C. 706. It was observed by Le Blanc J. that it was not considered in this case that the pauper went to Knowstone for the

The remaining circumstances necessary to the residence of an hired servant, are peculiar to that species of settlement.

Must reside under indentures.

It is evident, from the words of the statute 3 W. & M. c. 11. and the cases already cited, that an apprentice must reside in the place in which he seeks a settlement, subject to the binding power of his indenture, and the control of his master. (1)

A. was bound apprentice to a mariner. Having served him three years, he heard that his master had become a bankrupt, and left T., his place of abode. He applied in consequence to the agent of the vessel for money to enable him to return to T. On his arrival at T. he resided with his uncle, not being able to find his master, *whom he has never seen nor served since.* The court were of opinion that he gained no settlement by this residence in T.; for it appeared by the case that A. never returned to his master's service in the parish of T., for his master had absconded before his return, but he went to live with his uncle; and it is expressly found, that he never saw nor served his master afterwards. In Rex *v.* Brighthelmstone (2), the apprentice returned to his master again in the original parish. (3)

One apprenticed for seven years, served his master in S. till within four months of the expiration of his term, when his master agreed that he should serve O. during the remainder of the term in the parish of H., who was to board and lodge him, and pay the original

the purpose of cure, but that the original master, who lived in the same parish, and was bound to receive him, did receive and place him there. Rex *v.* Stratford-upon-Avon, 11 East, 176.

(1) Ante, sect. iv. 506.
(2) Ante, 523. n. (2).
(3) Rex *v.* Topsham, ante, 525. n. (5).

master 3s. weekly for his services, which agreement was made without consulting the apprentice. Having served O. three months in H. and being dismissed by him, at the request of the officers of that parish, the apprentice, unknown to his original master and without any intention of returning into his service, lodged one night in his first master's parish, S., and then went into a third, where he worked for himself for a month when his term expired; he then went with his original master to a common friend, with whom his indenture was deposited, and took it up. It was held that his residence for the last night in S. being merely casual and not under the indenture, could not be coupled with his antecedent residence so as to bring back his settlement there, and supersede that which he had acquired in H. under the agreement made by his original master with O. (1)

Distinction between servants and apprentices, as to residence under incapacities.

While he resides in his master's service, no change in his condition creates an incapacity to acquire a settlement, as it may in the case of a servant (2). Those points, therefore, respecting a servant's residence under incapacities, which have been formerly discussed, will seldom or never arise. Questions upon residence, under distinct deeds of apprenticeship, with the same, or different masters, can hardly originate in a transaction of this nature. But if chance should give birth to such a case, the court would, in all probability, consider it as governed by the same rules which apply to an hired servant under the like circumstances.

It is of the utmost importance to render this part of the law, not only certain, but easy and plain, and not to encumber it with nice or numerous distinctions. The

(1) Rex *v.* Smarden, 13 East, 452. Rex *v.* Chirk, ante, 512. Rex *v.* Barmby in the Marsh, ante, 526. But the observation admits of some exception in the case of certificates. See post.

(2) Ante, 410. See also

judges have inclined with this view, to a conformity of decision, between the two species of settlement, so far as the express provisions of the several statutes upon which they respectively depend are found to admit of it.

There are no particular statutory disabilities which respect settlements by apprenticeship. Such as relate to certificates will be treated of in another place.

SECT. VI.

Of the Proofs necessary to establish a Settlement by Apprenticeship.

Proof of settlement.

In order to establish a settlement by apprenticeship, it is necessary to prove, 1st, The binding by indenture; 2d, The identity of the apprentice; 3d, His service and residence of forty days in the town or parish; 4th, If the service is with any other than the original master, his consent.

1. The binding.

To prove the binding, the deed of apprenticeship, if in existence, and not in the hands of the opposite party, must be produced (1). If in the custody of a third person, he should be served with a *subpœna duces tecum*, to bring it with him on the hearing of the appeal. If possessed by the opposite party, he should be served with notice to produce it. It will appear, by the deed, whether it is properly stamped, without which it cannot be read in evidence (2). But the court may look into it for

Deed in custody of others.

Stamp.

(1) Rex *v.* Holbeck in Leeds, Burr. S. C. 198. Rex *v.* St. Helens, Burr. S. C. 735.

(2) Rex *v.* Holbeck, ante, n. (1).

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the purpose of seeing when it ceased to operate, in order to guide them as to receiving parol evidence respecting a subsequent settlement. (1)

Proof of execution.

The execution, or signing, sealing, and delivery, is to be proved, unless in certain cases, which will be mentioned hereafter.

How proved when no subscribing witness.

If there be no subscribing witness (2), or the name of a fictitious person has been put as such (3), or if he who subscribes the deed as such denies having seen the execution (4), it is sufficient to prove the hand-writing of the parties. If a parish indenture be unattested, proof of the hand-writing of the parish officers who signed it, is perhaps sufficient in a question with the parish. But, as against third persons, all material signatures which appear on the deed, should be proved.

When attested.

If the deed is regularly attested by one witness, he should be produced, unless he labours under some incapacity (5). It is unnecessary that he should *see* the party sign. If the latter be in an adjoining room, and brings it to the witness, acknowledging that he has signed and sealed, that is sufficient. (6)

Witness incapacitated.

If the witness be dead (7), or blind (8), or mad (9), or abroad (10), whether domiciled there, or not (11), or

(1) Rex *v.* Pendleton, 15 East, 449.

(2) Com. Dig. Tit. Fait. (B. 4). Vide 1 Lev. 25. Rex *v.* Middlezoy, post. 535 (4).

(3) Fasset *v.* Brown, Peake's N. P. Cas. 23.

(4) Grellier *v.* Neale, ib. 146.

(5) Breton *v.* Cope, Peake's N. P. C. 30. Buckley *v.* Smith, 2 Espin. N. P. C. 697.

(6) Park *v.* Mears, 2 Bos. and Pul. 219. Powell *v.* Blacket, 1 Espin. N. P. C. 97.

(7) Barnes *v.* Trompowsky, 7 Term Rep. 265.

(8) Wood *v.* Drury, 1 Lord Raym. 734.

(9) 12 Vin. Abr. (T. 6. 48). Pl. 12.

(10) *i. e.* in a country out of the jurisdiction of the superior English courts, Price *v.* Blackburn, 2 East, 250. Coghlan *v.* Williamson, Dougl. 93. Holmes *v.* Ponten, Peake's N.P.C. 99. Barnes *v.* Trompowsky, ante, (7). Adams *v.* Ker, 1 Bos. and Pul. 360.

(11) Price *v.* Blackburne, ante, (10); and see 26 Geo. III. c. 57. s. 38. as to the testimony of persons residing in the East Indies.

cannot be found after diligent inquiry (1), or is incapacitated by crime (2), or interest (3), it will be sufficient to prove his hand-writing, after shewing his situation.

When two witnesses.

If there are two or more witnesses to the execution, it is sufficient to call one. If some are incapacitated one must be called who is not. If all labour under incapacity, it is sufficient to prove the signature of one (4). It was held in one case, that under such circumstances, the signature of the witness, and also of the party, must be proved (5.) But this has since been adjudged unnecessary; for that of the attesting witness, when proved, is evidence of every thing on the face of the paper (6). Where one witness was dead, and the other denied the execution of the instrument, but acknowledged his signature, Lord C. J. Holt admitted evidence of the other's writing. (7)

Hand-writing how proved.

Proof of hand-writing must in general be either from having seen the party write the signature in question, or from previous acquaintance with his writing. The most usual method of acquiring this knowledge is by having seen him write. Yet it is sufficient if it be derived from a correspondence in writing with the party (8). But the witness must know, that the letters were written by

(1) See Cunliffe *v.* Sefton, 2 East, 183.

(2) Jones *v.* Mason, 2 Str. 833.

(3) Godfrey *v.* Norris, 1 Str. 34. Goss *v.* Tracey, 1 P. Wms. 289. Swire *v.* Bell, 5 Term Rep. 372.

(4) Adams *v.* Ker, 1 Bos. and Pul. 360. Cunliffe *v.* Sefton, 2 East, 183. But Wallis *v.* De Lancey, 7 Term Rep. 266. n. c. is contra.

(5) Wallis *v.* De Lancey, supra, n. (4).

(6) Adams *v.* Ker, supra, (4), Cunliffe *v.* Sefton, ib. and see Price *v.* Blackburne, 2 East, 250.

(7) Blurton *v.* Toon, Skin. 639.

(8) Gould *v.* Jones, Bull. L. N. P. 236. 1 Black. Rep. 384. Lord Ferrers *v.* Shirley, Fitzg. 195. where the party resided abroad, to which case the rule is confined by Willes *v.* Singer. Espin. N. P. C. 144. But the reason extends to correspondence in this country. See the opinion of Lord Raymond, C. J. in Lord Ferrers *v.* Shirley, and the constant practice at present is to admit such proof.

the

the particular individual, as by having received them in the course of correspondence, or the like. Having seen the superscription of letters which passed at the post-office, as his franks, or perused papers, not received from the party by the witness, but by others, who told the witness from whom they came, is not sufficient; for they may have been forgeries. (1)

Comparison of hands.

Evidence by mere comparison of hand-writing is inadmissible: there must be a degree of habitual acquaintance with the writing. (2)

The rule, however, as to the inadmissibility of proof of hand-writing by comparison, is narrowed to instances where the nature of the case admits of the hand-writing being proved by living evidence. Therefore an ancient instrument may be shewn to be the writing of a particular person, by comparing the writing with that of some other document proved to be written by him. (3).

Degree of knowledge.

Slight knowledge acquired from competent sources is, *primâ facie*, sufficient to prove a signature. But it must be

(1) Lord Ferrers *v.* Shirley, ante, 532. (8). Carey *v.* Pitt, Peake's Law of Ev. App. 40.

(2) Brookbank *v.* Woodley, coram Yates, J. 4 Supp. Vin. Abr. (A. 6. 21.) Pl. 6. Stanger *v.* Searl, 1 Espin. N. P. C. 14. Macpherson *v.* Thoytes, Peake's N. P. C. 20. Rex *v.* Cator, 4 Espin. N. P. C. 117. The point seems very clear; if the jury or other tribunal are required to find the fact by comparing the exhibit with other signatures, proved to be the hand-writing of the party. But the distinction grows nice, when a witness is called to speak to it; for, unless where he has seen the instrument actually written, he must in all cases speak from a comparison which he institutes between it, and what he recollects of other pieces of the party's writing. See Bull. L. N. P. 206. and a case cited there before Lord Hardwicke, C. Allesbrook *v.* Roach, Peake's L. Ev. 104. Da Costa *v.* Pym, 1 Espin. N. P. C. 351. Peak. Evid. App. 22. S. C. Goodtitle *v.* Braham, 4 Term Rep. 497. and Osburn *v.* Hosier, 6 Mod. 167.

(3) Per Le Blanc, J. Roe ex dem. Brune *v.* Rawlings, 7 East, 282. Per Hardw. C. 6 Dec. 1764. Bull. L. N. P. 236. See also Moorewod *v.* Wood, M. 32 G. III. 14 East, 327.

derived solely from acquaintance with the hand-writing; belief founded upon extraneous circumstances, such as the witness's knowledge of the party, and the nature of the deed, are inadmissible. (1)

Proof of sealing and delivery.

If the signature is proved, the sealing and delivery shall be presumed (2); at least where the attestation imports so much (3). But if by special custom any thing is equivalent to sealing a deed, that custom must be proved (4). Actual proof may rebut the presumption of a proper delivery, which arises from attestation.

Delivery, what.

Casting a deed upon the table, without doing more, does not amount to a delivery (5). But casting it upon the table, saying, this will serve, is sufficient. (6)

Assent of justices to parish indentures.

In the case of parish apprentices, the assent of two justices is necessary (7); and if given in writing, the signatures must be proved in the same manner (8), and subject to the same rules as the execution of indentures. But there is no occasion to prove their appointment as magistrates. For, "in the case of all peace-officers, justices of the peace, constables, &c. it is sufficient to prove that they acted in those characters, without producing their ap-

(1) Da Costa *v.* Pym, ante, 533. (2). Balcetti *v.* Serrani, Peake N. P. C. 142.

(2) Grellier *v.* Neale, Peake's N. P. C. 146. Adams *v.* Ker, post. (4); and see Stone *v.* Grubham, Roll. Rep. 3.

(3) Even where there is no subscribing witness, the presumption seems in favour of delivery, as signing and sealing would otherwise be nugatory; and at all events this presumption may be raised or rebutted in such a case, by extrinsic circumstances, such as the custody of the deed, &c. See Hands *v.* James, Com. Rep. 531.

(4) Adams *v.* Ker, 1 Bos. and Pul. 360.

(5) Chamberlain *v.* Staunton, 1 Leon. 140. Pl. 193. Cro. Eliz. 122. S. C.

(6) Ibid.

(7) Rex *v.* Hamstall Redware, 3 Term Rep. 380. Rex *v.* Winwich, 8 Term Rep. 454. And see ante, 485. n. (1).

(8) See Rex *v.* Bilton, 1 East, 13. the examination of a soldier under the Mutiny Act, touching his settlement, ante, 445. (3).

pointments;

pointments; and that even in the case of murder (1)." And in an indictment for disobeying a justice's order for diverting a road, it was held unnecessary to produce the commission of peace to prove the persons to be magistrates who signed the order. (2)

Where the master has signed the counterpart, he is estopped from shewing that the indenture and counterpart were at that time signed by one justice only. (3)

Proof of execution unnecessary. Deed coming from adversary.

It was formerly adjudged, that proof of the execution was unnecessary, if the deed came out of the hands of the adverse party. For the side relying upon it cannot know who are the subscribing witnesses, or come prepared to prove the execution (4). Therefore in the case of an appeal between two parishes, it was held unnecessary for the respondents to prove the execution of indentures of apprenticeship, they being in the custody of the appellant parish, and produced by them (5). The propriety of this decision was doubted by very high authority. For, in a subsequent case, where a similar point came before the court, Lord Kenyon said, "it was too important a question to be discussed in a sessions case, where the opinion of a court of error could not be taken; and that nothing but a solemn judgment of the house of lords should ever persuade him that the above decision was right." (6)

The rule seems reasonable where those who retain the custody appear parties to the instrument, or preserve it as a

(1) Per Buller, J. Berryman *v.* Wise, 4 Term Rep. 366.; and so determined by all the Judges in Gordon's Case, Leach. Cro. Law, Cas. 278. n. a.

(2) Per Hotham, B. after conference with Heath, J. Rex *v.* —— Kingston Lent Assizes, 1801.

(3) Rex *v.* Saltern, Cald. 444.

(4) Rex *v.* Middlezoy, 2 Term Rep. 41.

(5) Supra, n. (4).

(6) Rex *v.* Dalton, Mich. 41 G. III. Peake's Law of Evid. 2 Edit. 109.

document of a title or right (1). For, in the first case, they may disprove the execution; and in the second, it derives authority from being preserved by them.

But the point has been decided the other way, and Rex *v.* Middlezoy is now overruled by the following case:

Witness necessary though deed in adversary's custody.

In an action on a policy of insurance, the declaration contained an averment of the plaintiffs' interest. The defendant meaning to dispute their interest, gave them notice to produce at the trial certain articles of agreement between them (who were also owners of the ship) and the captain, whereby he contended it would appear, that the captain, who was not a plaintiff, was interested in one third of the cargo; and if so, the defendant having paid more than enough into court to cover the plaintiffs' shares, would have been entitled to a verdict, unless the plaintiffs were entitled to recover the remainder of the sum in hand, as trustees for the captain, which depended on the construction of the articles. The plaintiffs produced the instrument at the trial, in pursuance of this notice, when there appeared to be two subscribing witnesses to it, and therefore the plaintiffs insisted that the defendant could not give it in evidence, without calling one of those witnesses; and Lord Ellenborough being of that opinion, the plaintiffs recovered.

(1) It does not appear in Rex *v.* Middlezoy, whether the pauper was bound out by Sydbury parish; if it was so, then, the parish which produced the indentures was party to the binding. The notice also was, to produce at the trial of the appeal "a certain indenture of apprenticeship bearing date, on or about, &c." And being described as a valid deed, the opposite party by producing it under that description, seemed to admit it to be so. Vide Passal *v.* Godsal, 2 Term Rep. 44. But no such notice is stated in Thomson *v.* Jones, ib. Yet the lease was held admissible, "as coming out of the hands of the other party."

On

On a motion for a new trial, it was argued that the instrument, coming out of the plaintiffs' hands upon notice to produce it, was not necessary to be proved by one of the subscribing witnesses, according to the rule laid down in Rex *v.* Middlezoy. But Lord Ellenborough, C. J. said "that the case of the King *v.* Middlezoy, which was much questioned at the time, had been since overruled; and that it was not enough to give notice to the opposite party in a cause to produce an instrument in his hands, in order to dispense with any further proof of it by the party giving the notice; but that the production of it at the trial, in pursuance of such notice, did not supersede the necessity of proving it by one of the subscribing witnesses." And Lawrence J. said "that this had been so ruled by Lord Kenyon in a subsequent case, respecting a will, which the adverse party, in whose hands it was, had notice to produce at the trial, when it appeared that there was a subscribing witness to it; and Lord Kenyon held, that the party calling for it was bound to call one of the subscribing witnessess to prove the instrument." Lord Ellenborough, C. J. added, "that the case of a will shewed strongly the necessity of adhering to the strict rule of proof, and the enormity of the general proposition, that the production of an instrument, by an adverse party, in consequence of a notice, dispensed with the general rule of proving its execution by a subscribing witness; for if a party were fixed with the possession of an instrument affecting his property, however questionable its execution might be, and even though he had impounded it, because it was forged, or had been obtained by fraud, that, according to the argument, was to relieve the party attempting to avail himself of it from calling the subscribing witness." The court granted a new trial, on payment of costs, on the ground of surprize, and to give the defendant an opportunity of calling the subscribing witness; but

but refused it on the ground that notice to produce an instrument coming out of the hands of the adverse parties, *whose instrument it purported to be*, was sufficient to establish it without further proof. (1)

How in adversaries' custody.

But it was always required, that the deed should be in the custody of the parties interested in the suit, or at least in that of their agents, to render the production of an attesting witness unnecessary. A deed in the hands of one who was attorney for the adverse party at the time of the execution, but who was not so at the trial, must be regularly proved. (2)

Deed 30 years old.

When necessary to prove signatures to old instruments.

It is unnecessary to prove the execution of a deed thirty years old (3), although the subscribing witness is alive (4). Some account is usually given, of where it has been kept or found, &c. (5); and if there be any blemish by erasure, or interlineation, it seems prudent to prove the execution by the witnesses, if living; or if dead, by proving the hand-writing of one of them at least; and also that of the party, in order to encounter the presumption arising from such blemishes. (6)

Parish certificate 30 years old.

But it was held sufficient to produce a parish certificate, more than thirty years old, at the hearing of an appeal, and that the parties producing it need not shew from whence it came. (7)

Seal torn off.

If the deed appears cancelled, or the seal torn off, that is *primâ facie* evidence of its being no longer in force.

(1) Gordon *v.* Secretan, 8 East, 548.

(2) Leith *v.* Post, 1 Espin. N. P. C. 296.

(3) Bull. L. N. P. 255.

(4) In Marsh *v.* Colnett, 2 Esp. Ni. Pri. Cas. 666.

(5) Bull. L. N. P. 255.

(6) Chettle *v.* Pound, ib.

(7) Rex *v.* Ryton, 5 Term Rep. 259.

But

But proof may be given, that it was cancelled by ill practice (1), or that the seal was torn off by accident (2). If the contract be joint, and the seal of one obligor is torn off, it destroys the obligation; but if they be severally bound, it continues as to the other, whose seal was not torn off (3). But if two men be jointly and severally bound, and the seal of one is torn off, this is a discharge of the other; for the manner of the obligation is destroyed *by the act of the obligee.* (4)

If a deed be altered by a stranger in an immaterial point, it is not avoided; but otherwise, if he alter it in one that is material. Also if the party himself alter it in one that is immaterial, it avoids the deed (5). And if one covenant be altered, it destroys it likewise (6). Further, if blanks be left in material places, and filled up afterwards by assent of parties, yet is the obligation void, for it is not the same contract that was sealed and delivered. As if a bond were made to C. with a blank left for his christian name, and addition, which is afterwards filled up. But if A. with a blank left after his name, be bound to N. and if C. is added afterwards as a joint obligor, it does not avoid the bond; for it does not alter the contract of A. who was bound to pay the whole money, before any such addition. (7)

How far evidence when cancelled.

A deed, although purposely defaced, will (where duly proved) be good evidence to establish all the legal consequences from the time of delivery until that of cancelling. (8)

(1) Buckrow's case, Hetl. 138.

(2) Anon. Latch. 226. Palm. 403. Per Twisden, J. Clerk *v.* Heath, 1 Mod. 11.

(3) Bull. L. N. P. 268. cites 5 Co. 23. 11 Co. 28. b. Lev. 220. 2 Show. 28, 29.

(4) Bull. L. N. P. 268. cites March. 125.

(5) Bull. L. N. P. 267.

(6) Bull. L. N. P. 267. cites 11 Co. 27.

(7) Ib. 281. n. (8).

(8) ib. 267. and the cases cited.

Where

Deed lost. Where an original deed is lost, or destroyed by time or accident (1), or is in the custody of the adverse party, who refuses to produce it (2), "the counterpart may be read (3); and if there is no counterpart forthcoming, then a copy (4) may be admitted: and even if there should be no copy, there may be parol evidence (5) of the deed." (6)

Loss proved. Where the deed is lost or destroyed, it will be necessary to prove the loss of the original, and that it was a genuine instrument 7). For this purpose, it must be shewn, that inquiry has been made after it (8); and the loss must be proved by the person to whose custody it is traced. In order to establish an apprenticeship in a question of settlement, it was proved that the indenture was of two parts; that one had been destroyed, and the other had come into the hands of A. who was then living, and who upon application being made for it, said she could not find it. But A. was not subpœna'd to give evidence, or produce it; and therefore it was held, that the in-

(1) Doctor Leyfield's case, 10 Co. 926. Underhill *v.* Durham, Freem. 502. Meddlicott *v.* Joyner, 1 Mod. 4. 2 Keb. 546. S. C. Whitfield *v.* Fausset, 1 Vez. 389. Thurston v. Delahay, Bull. L. N. P. 254. Pritchard *v.* Symonds, ib. Goodier *v.* Lake, 1 Atk. 446. Lynch *v.* Clerk, 3 Salk. 154.

(2) Young *v.* Holmes, 1 Str. 70. Clayt. 15. Pl. 2. Negus *v.* Reynal, Keb. 22. Basset *v.* Basset, 1 Mod. 266. Anon. Lord Raym. 731. Gilb. Law Evid. 3d Ed. 97. Sturt *v.* Mellish, 2 Atk. 611.

(3) Per Grose, J. Rex *v.* Middlezoy, ante, 535. (4), and the cases post.

(4) Thurston *v.* Delahay, Bull. L. N. P. 254. So of an order of removal, Rex *v.* Kirkby Stephen, Burr. S. C. 664. post. vol. ii. chap. 37. sect. vii.

(5) Sir Edw. Seymour's case, 10 Mod. 8. post. 544. (4). Rex *v.* Metheringham, post. 544. (6).

(6) Per Lord Hardwicke, C. Villiers *v.* Villiers, 2 Atk. 71.

(7) Goodier *v.* Lake, 1 Atk. 446.; and see Lord Peterborough *v.* Mordant, 1 Mod. 94. But Page and Chapple, J. were of opinion, "that after length of time, parol proof of indentures shall be sufficient; because in all probability, these indentures may be lost; and indeed they are frequently burned when delivered up by the master at the end of the term." Rex *v.* East Knoyle, Burr. S. C. 151.

(8) Rex *v.* St. Sepulchre's, 2 Bott, 362. Pl. 391.

denture had not been proved lost or destroyed, so as to let in other evidence of the contents. (1)

The case stated, that J. H. the pauper's husband, lived from the age of five to fifteen in St. Helen's, with his grandfather W. H. who was a basket maker. The mother of J. H. gave in evidence, that "J. H. was bound apprentice to his grandfather by indenture for seven years, which indenture was delivered into the grandfather's custody, as she had been informed by J. H., but she never saw the indenture, and knew nothing of it but from his information; and it was reputed in the family that J. H. was his apprentice, and he was so described in the grandfather's will." It further appeared in evidence, that J. H. served his grandfather five years *under the said indentures*, in St. Helen's, and was provided for by him during that time in clothes and necessaries. W. H. died in 1738, leaving M. H. his widow, and T. H. his son. One B. by order of St. Saviour's parish, applied in 1748 to T. H. who then lived with his mother in the house where W. H. died, and where his goods and effects were, to know whether he had in custody any indenture of apprenticeship between W. H. and J. H., and T. H. told B. that he could not find it. B. did not inquire who was the executor or representative of W. H., nor did it appear at the sessions that he made any other search to find out the indentures, or that they were lost, save as aforesaid, and they were not produced. T. H. also gave evidence, that he had drawn indentures of apprenticeship between W. H. and J. H. but that they were not stamped, and that the latter, after the death of W. H. refused to serve his widow and executor on that account. The sessions considering this to be sufficient evidence of a service by apprenticeship in St. Helen's, confirmed the original order, adjudging

Binding not proved.

(1) Rex v. Castleton, 6 Term Rep. 236.

his

his family to be settled there. But the court of king's bench thought that enough was not stated to shew that there was a binding within the act, and quashed both orders. (1)

Loss proved. But where there was but one copy of an agreement to rent a land-sale colliery as tenants for one year, and it was deposited in the hands of the landlord, who upon application made several times before his death by the tenant, refused to produce to him the agreement. The landlord died three years previous to the appeal, which was heard ten years after executing the agreement; and the tenant swore at the hearing, that he did not know in whose custody the agreement now is, or whether it is in being or not. Neither has he made any inquiry for it since the landlord's death. The court were of opinion, that parol evidence of this instrument had been properly admitted by the sessions. *Per* Willes J. "It had expired many years; the lessor had been dead three years, and in his life had repeatedly refused a sight of it to the pauper, who knew not where it was, or whether it existed. In this state of things, there was so little prospect of effecting any thing by further pursuit, that I think the evidence was properly admitted." Buller J. "Had it been in proof, that the executor of the lessor had been in possession of this instrument, it might have varied the case. After the expiration of the lease, the lessee, the pauper, was entitled to it, in strictness: but he neither had it, nor knew whether it existed; and it is now nine years after its expiration. Under such circumstances, parol evidence was properly resorted to." (2)

Binding proved. Upon a question of settlement of the wife and children of a militiaman, it appeared by his examination, taken

(1) Rex *v.* St. Helen's, Burr. S. C. 292. Ib. 735. S. C.

(2) Rex *v.* North Bedburn, Cald. 452.

in writing, under the mutiny act, that he went apprentice to J. M. and served five years and an half. The pauper, who was his wife, proved her marriage four years ago, that he ran away from her nine months afterwards, and that she had neither seen, heard from, nor known what was become of him since. J. M. the supposed master, being dead, this was held a reasonable presumption of a binding, although some circumstantial evidence was produced by the other side, to shew that J. M. never had an apprentice; "for every thing is to be presumed in favour of a settlement." (1)

If two parts, both must be proved lost, to let in secondary evidence.

It is an universal rule, that the best evidence which can be given by the party must be produced (2). If two or more parts are executed therefore, the loss or destruction of all must be proved before a copy can be allowed as evidence. (3)

Copy evidence when.

In order to let in a copy where the original is in the adverse party's custody, that fact must be shewn. And proof of delivery to his servant is insufficient without calling the servant (4). But a copy may be read, after proof that the original came into the hands of defendant's brother, under whom defendant claimed; even though the defendant had sworn, in an answer in chancery, that he had not got the original (5). It is also necessary to prove that he or his attorney has been served with notice to produce it. (6)

(1) Rex *v.* St. Michael's, Bath, 2 Bott, 459. Pl. 480. The wife gave evidence also of her husband's declarations, that he had served an apprenticeship to J. M. The inadmissibility of which, see ante, 443. But the authority of this case seems questioned in Rex *v.* Clayton Le Moore, 5 Term Rep. 704.

(2) Bull. L. N. P. 293.

(3) Pritchard *v.* Symonds, Bull. L. N. P. 254. and see Rex *v.* Castleton, ante, 541. (1).

(4) Rex *v.* Pearce, Peake's Ni. Pri. Cas. 75. But see Col. Gordon's case, Leach Cr. Law Cas. 244.

(5) Bartlett *v.* Gawler, Bull. L. N. P. 254.

(6) Attorney General *v.* Le Merchant, 2 Term Rep. 201. (a). Per Buller, J. Rex *v.* Watson, ib. Leach's Cro. Cas. 214. Cates qui tam *v.* Winter, 3 Term Rep. 306.

A coun-

Counterpart.

A counterpart of a deed is not properly a duplicate original, for it is executed only by one party. It is admissible evidence against any person who signs it, without giving him (1), or his assignee (2), notice to produce the original; for it recites the execution of the original, and in the first case is executed by the party, and in the second by one who is bound by his acts, as deriving title under him. But it cannot be read in evidence against a third person, without accounting for the want of the original. (3)

Deed in hands of slighter evidence required.

Slighter evidence is required to establish the contents of a deed, which is proved to be in the hands of the opposite party, than if it is shewn to be lost or destroyed; for in the former case, if the party is wronged by the evidence, he may set it right by producing the real instrument. (4)

Parol evidence of.

But parol evidence is sufficient, where a deed of indenture (5) or order of removal is lost (6); and where parol evidence is given of an indenture, and a consideration paid with the apprentice, the sessions should take it for granted that they were stamped, and the duty paid (7): for a fraud is not to be presumed. (8)

Stamp presumed.

An indenture, executed thirty years before, in the county of Northampton, was proved to have been de-

(1) Burleigh *v.* Stubbs, 5 Term Rep. 465. But see Yelverton *v.* Cornwallis, Noy. 53.

(2) Roe ex dem. West *v.* Davis, 7 East, 363.

(3) Per Holt, C. J. Anon. Salk. 287. 6 Mod. 225. Sir Wm. Poole's case, 12 Vin. Ab. (2*). Pl. 4. Per Grose, J. Rex *v.* Middlezoy, ante, 535.

(4) Sir Edw. Seymour's case, 10 Mod. 8. 12 Vin. (T. b. 65). Pl. 22. Eccleston *v.* Speke, Carth. 80. Young *v.* Holmes, 1 Str. 70.

(5) Rex *v.* Badby, 1 Bott, 547. Pl. 746. Rex *v.* Little Bolton, Cald. 367. ante, 482. (1). Rex *v.* Wantage. 1 East, 601.

(6) Rex *v.* Metheringham, 6 Term Rep. 556.

(7) Rex *v.* Badby, ante, (5).

(8) Rex *v.* East Knoyle, Burr. S. C. 151.

livered

livered to the apprentice at the expiration of his time, and lost. The parish in which he was settled by service under it, had relieved and otherwise treated him as a parishioner for the last twelve years previous to the appeal. The court was of opinion, that the sessions, under these circumstances, were right in presuming that the indentures had been regularly inrolled and stamped, although the other side proved, by the deputy register and comptroller of the apprentice duties, that it did not appear that any such indenture had been stamped with the premium stamp from 1773 to 1805. For the presumption of law is to be favoured; and against this negative evidence by the comptroller, may be set the possibility of an irregularity in the return made to the office. (1)

By 42 Geo. III. c. 46. sect. 1. overseers of the poor, and by sect. 6. all other persons having the like powers, are directed to keep a book at the expence of the parish, &c. and enter therein the name of every child bound out by them as an apprentice, together with several other particulars, according to a schedule annexed to the act, and this register is to be laid before the justices, who assent to each indenture at the time the indenture is laid before them; and each entry in the register, if approved by the justices, is to be signed by them. 42 Geo. III. c. 46. s. 1.

By sect. 3. all persons may inspect this book, and take a copy upon payment of sixpence. "And every such book shall be, and be deemed to be, sufficient evidence in all courts of law whatsoever, in proof of the existence of such indentures; and also of the several particulars specified in the said register, respecting such indentures, in case it shall be proved to the satisfaction of such court that the said indentures are lost or have been destroyed." Sect. 3.

By sect. 5. where an apprentice is assigned under 32 Geo. III. c. 57. "the overseer or overseers, party or Sect. 5.

(1) Rex v. Long Buckby, 7 East, 45.

parties to the assignment, shall insert the name and residence of the master or mistress to whom such apprentice shall be assigned or bound over, together with the other particulars, in the book herein directed to be provided and kept by them."

Parol evidence inadmissible to contradict a written agreement.

It is a general rule, that parol evidence is inadmissible to contradict (1), or substantially to vary a deed, or other written instrument (2), or to explain an ambiguity that is patent, *i. e.* apparent, on perusal of the instrument itself: such as the total omission of a devisee's name in a will. (3)

But 1st, may explain a latent ambiguity.

But it may be given, 1st, To explain a latent ambiguity, that is, where the uncertainty does not appear upon the face of the writing, but is raised by extrinsic circumstances. For, being let in by parol evidence, the same kind of evidence that introduced the doubt, may be admitted to explain it (4). Such are imperfect and equivocal descriptions of persons, parties, or places mentioned in the instrument (5). A. devised an estate to her cousin J. C. and had two of that name, father and son: parol evidence was admitted to shew the son was intended (6). So, if the devisee is mentioned by a nickname; or, if a wrong name is inserted by mistake (7). So whether parcel or not of the thing demised is matter of evidence. (8)

(1) Lord Bacon's Maxims, Reg. 23. p. 99.

(2) Meres & Al' *v.* Ansell, & Al' 3 Wils. 275. Clifton *v.* Walmsley, 5 Term Rep. 564. Gunnis & Al' *v.* Erhart, 1 H. Black. 289. Wilson *v.* Poulter, 2 Str. 794. Coker *v.* Guy, 2 Bos. & Pul. 565.

(3) Ballis & Church *v.* Attorney General. Per Hardwicke, C. Bull. L. N. P. 298. post. (6)

(4) Per Lord Kenyon, C. J. Lord Walpole *v.* Lord Cholmondeley, 7 Term Rep. 138. post. 549.

(5) Jones *v.* Newman, 1 Black. Rep. 60. 3 Wils. 276. Cheyney's case, 5 Co. 68. S. P.

(6) Baylis & Al' *v.* the Attorney General, 2 Atk. 239.

(7) Beaumont *v.* Fell, 2 P. Wms. 141. See also Thomas *v.* Thomas, 6 Term Rep. 671.

(8) Doe ex dem. Freeland *v.* Burt, 1 Term Rep. B. R. 70. But this evidence seems admissible only to explain, and not to contradict the description which is given by boundaries in a lease.

2d. Parol evidence may be given to ascertain a fact which does not contradict, but is collateral to the deed. 2d. To explain a fact collateral to the deed.

Upon a question of settlement, it appeared, that the pauper had made the following agreement in writing: "I. J. M. do hereby agree with J. C. *to serve me* three years to learn the business of a carpenter; the first year, to have one shilling and two pence per day; the second, one shilling and sixpence per day; the third year, one shilling and ten pence;" which agreement was signed by both parties. Parol evidence was admitted to prove, that at the time of signing the agreement, J. C. agreed to give J. M. three guineas, and that he was not to be, and never was employed in any other work than that of a carpenter (1). "For it was not offered to contradict the written agreement, but to ascertain a fact collateral *thereto, in order to explain the intention of the parties*, the instrument being in some measure equivocal." (2)

In order to save expences, a written agreement was entered into, upon unstamped paper, whereby the pauper agreed to serve four years, at weekly wages, which were to increase annually. Evidence was admitted by the sessions to shew, that, at the time of signing, it was further agreed by parol, between the pauper and his master, that the pauper should find his own diet and lodging, be his own master on Sundays, and not be paid for the time he should play. The Court of King's Bench gave no opinion as to the admissibility of the evidence, but they made no objection to its having been so received. (3) Parol evidence of a further agreement.

The pauper claimed a settlement by residence on an estate, acquired by purchase. The consideration ex- Parol evidence of a further

(1) Rex *v.* Laindon, 8 Term Rep. 379. 1 Bott. 710. Pl. 1000.

(2) Per Lawrence, J. ib.

(3) Rex *v.* Highnam, Cald. 491. 2 Bott. 381. Pl. 409. But see Meres & Al' *v.* Ansell & Al', 3 Wils. 275.

consideration.

pressed in the deed of conveyance was only 28l. Parol evidence was admitted to prove, that 30l. was the consideration actually paid. (1)

To explain the direction of a parish certificate.

A parish consisted of several hamlets, having separate churchwardens and overseers. A certificate under 8 & 9 W. III. c. 30. was granted by the officers of one hamlet, in which they described themselves as churchwardens and overseers of the poor of the parish, and acknowledged the pauper to be settled within the parish. Parol evidence was held admissible to shew, that they were officers of that particular hamlet; for it does not contradict, but explains the certificate. (2)

3d. To shew fraud in executing the deed.

3d. Parol evidence is also admissible to shew fraud or imposition practised on the party, in executing the instrument, upon the same principle that it is admissible to prove a defective execution. Thus, where it was sought to set aside a second will on the ground of fraud, it was held, that parol evidence might be given of a question asked by the testator, at the time of executing it, whether the contents were the same as those of the former will? and his being answered in the affirmative, although it was in fact different; for it is evidence, that one paper was obtruded on the testator for another. (3)

Ninegeneral rules of evidence.

It may not be wholly useless to set forth the nine general rules respecting evidence, as they are laid down by an eminent judge (4), most of which are exemplified in what has been already stated.

1st Rule. You must give the best evidence that the nature of the thing is capable of: that is, no such evi-

(1) Rex *v.* Scammonden, 3 Term Rep. 474. Filmer *v.* Gott, cited 3 Term Rep. 475. 7 Bro. Par. Cas. 70.

(2) Rex *v.* Samborn, 3 Term Rep. 609.

(3) Doe on the dem. of Small *v.* Allen, 8 Term Rep. 147.

(4) Buller, L. N. P. 293. et seq.

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dence shall be brought that *ex naturâ rei* supposes still greater (1) evidence behind, in the parties' possession or power.

2d Rule. No person interested shall be a witness. (2)

3d Rule. Hearsay is no evidence, except as to the fact of *legitimacy*, *relationship*, *pedigrees*, rights of common, rights of way, and all rights depending upon custom, or prescription. (3)

4th Rule. In all cases where a general character or behaviour is put in issue, evidence of particular facts "(to affect it)" may be admitted: but not where it comes in collaterally. (4)

5th Rule. Ambiguitas verborum latens verificatione suppletur, nam quod ex facto oritur ambiguum verificatione facti tollitur. (5)

6th Rule. In every issue, the affirmative must be proved, unless where the law presumes the affirmative contained in the issue. (6)

7th Rule. No evidence need be given of that which is agreed in the pleadings.

8th Rule. Where special matter cannot be taken advantage of by pleading, it may be given in evidence, on the general issue.

9th Rule. If the substance of the issue is proved, is sufficient.

(1) i. e. Evidence of an higher order, ex. gr. no body shall give evidence by parol of what appears to have been reduced into writing. See ante, 463.

(2) See ante, 438.

(3) See ante, 443.

(4) Ante, 442.

(5) Ante, 546.

(6) And then the negative must be proved by the party who avers it. Williams *v.* East India Company, 3 East, 192.

Other requisites of the settlement how proved.

The remaining circumstances, necessary to establish a settlement by apprenticeship may be proved, either by direct testimony, or by inference, as is done in fixing the settlement of an hired servant (1). But if the original master's consent to service with another, is by regular assignment, that must be proved in the same manner as the original indentures (2); and although it be by a less formal writing, that is likewise subject to the foregoing rules.

(1) Ante, 432. et seq.

(2) Rex *v.* St. Paul's Bedford, 6 Term Rep. 452.

CHAPTER XXII.

Of Settlement by serving an Office.

SECT. I.

Of the Kind of Office.

THIS species of settlement depends upon 3 & 4 W. III. c. 11. sect. 6. which enacts, "that if any person, who shall come to inhabit in any town or parish, shall for himself, or on his own account, execute any public annual office or charge in the said town or parish, during one whole year, then he shall be adjudged and deemed to have a legal settlement in the same, though no such notice in writing be delivered and published, as is hereby before required." Ground of settlement. 3 & 4 W. & M. c. 11. s. 6.

Persons who reside under a certificate, may acquire a settlement by 9 & 10 W. III. c. 11. if they "shall execute some annual office in such parish, being *legally placed* in such office." The words of this act differ from those under which inhabitants unfettered by certificates are enabled to acquire a settlement under 3 & 4 W. III. But, although they vary from each other in some particulars, the court has inclined to give them the same construction, so far as can be done consistent with the letter of the statutes, for the purpose of placing all paupers, who are to gain a settlement by the exercise of annual offices, upon the same footing. (1) Certificates 9&10W.III.

(1) Fittleworth *v.* Pulborough, 2 Const. 167. Pl. 213.

The proper subject, however, of the present chapter, is the settlement given under 3 & 4 W. III. c. 11.; and the decisions upon 9 & 10 W. III. are only referred to here for the purposes of illustrating the former statute, or pointing out the distinctions between them.

1. Offices which confer settlement.

The office which is to confer a settlement under both statutes, for there seems to be no distinction between them in this respect, must be public, but need not be parochial. Not only those of parish clerk (1), sexton (2), and churchwarden (3), but also a warden for the borough (4), a tithing man (5), petty constable (6), or borseholder (7), collector of the land-tax (8), and duties on births and burials created by 6 & 7 W. III. c. 6. (9), are offices within the act. Likewise the office of bailiff, or aletaster for a borough; which consists in inspecting weights and measures within the borough, and warning the jury to serve at the court leet there (10); that of aletaster of a borough (11); and a hogringer *for the parish*; the duty being to attend the open commons, to see that *all* hogs turned thereupon, are rung, and to impound such as are not, the officer receiving one penny for impounding, and sixpence for ringing each hog, being an office of great antiquity, and serviceable to the inhabitants of the pa-

(1) Gatton *v.* Milwich, 2 Salk. 536.

(2) Rex *v.* Liverpool, 3 Term Rep. 118. and the church or chapel in this case was not the parish church.

(3) Per Lee, J. St. Maurice *v.* St. Mary Kalendar, 2 Const. 158. Pl. 203.

(4) St. Mary *v.* St. Lawrence in Reading, 10 Mod. 13.

(5) Holy Trinity *v.* Garsington, Cas. Sett. & Rem. 72.

(6) Rex *v.* Hope Mansel. Cald. 252. Rex *v.* All Cannings, Burr. S. C. 634. See also Rex *v.* Winterbourn, Burr. S. C. 520. post. 559. (2).

(7) Wingham *v.* Sellinge, Burr. S. C. 223. 2 Str. 1299.

(8) Rex *v.* Hammond, 2 Bott, 156. Pl. 199.

(9) Bisham *v.* Cook, ib. Pl. 200. See also Rex *v.* Whittlesea, post. 553. (1).

(10) Rex *v.* Whitchurch, Burr. S. C. 365.

(11) Rex *v.* Bow, 8 Term Rep. 445.

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rish (1), have been adjudged to confer settlements when duly executed.

A person was nominated by the rector, and licensed to perform the office of curate in the parish and parish church by the bishop, who assigned him a yearly stipend, and the person performed the duties for six years. The sessions were of opinion, that there was no service of an annual public office or charge under the act, and the court thought it impossible to argue against this conclusion. For *per* Lord Kenyon, C. J. "The statute was evidently intended to be confined to inferior annual officers, such as constables and the like, known to the parish; and though in some instances the construction has been carried further, yet he was not inclined to extend it to cases still further from the contemplation of the legislature." (2) Office, what? Curate.

The 3 W. III. c. 11. uses the terms "public office or *charge*." The latter word, coupled as it is in the act with *office*, must be taken to mean something of the same kind, though it may not commonly be known under the name of an office (3), and the office which is to confer a settlement under this act must be created by the law, and not by the mere act of the parties themselves (4), otherwise every contract with the parishioners, for any purpose, would be a public charge, and it would extend to contracts with carpenters for keeping the church in repair and the like, which are never considered to be within the meaning of the act. Charge, what?

The pauper was appointed master of the workhouse of Master of workhouse.

(1) Rex *v.* Whittlesea, 4 Term Rep. 807.
(2) Rex *v.* Wantage, 2 East, 65. See post. 556.
(3) Per Lawrence, J. Rex *v.* Mersham, 7 East, 167.
(4) Per Le Blanc, J. ibid.

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the parish of B. at a salary of 16*l. per ann.* (1) Nothing was said, either at the time of his appointment or afterwards, as to the time for which he was to hold his situation, but he conceived he might at any time be dismissed at a quarter's notice. He continued master of the workhouse four years, residing in B. and was dismissed during the fifth at a quarter's notice. He gained no settlement; for this is clearly no office, but only an employment arising out of a contract (2) with the parish.

But where the session stated in their case that the pauper was legally appointed governor of the workhouse in the parish of J. at an annual salary, and that the said office of governor is a public annual office; the court were of opinion, that the facts stated precluded discussion how far it was within the act, the sessions having found that the pauper served a public annual office in the parish to which he was legally appointed. (3)

2. Must be a public office.

2d. The office, or charge, must be a public institution. The exercise of a private employment confers no settlement, although ever so notorious in the parish.

Notoriety of employment insufficient.

"Every employment in the parish is not equal to express notice, though it be a matter of notoriety to the parish. It was once made a question, whether shoeing the horses of the lord of the manor was not equal to notice, but it was determined not to be equivalent (4). If a person is hogringer to certain individuals only (5), he would not thereby gain a settlement: but if he is not

(1) By virtue of 9 Geo. I. c. 7. s. 4.

(2) Rex *v.* Mersham, 7 East, 167. See also the opinion of Lord Kenyon, C. J. Rex *v.* Ilminster, 1 East, 83.

(3) Rex *v.* Ilminster, 1 East, 83.

(4) Talbury *v.* Foster, Fol. 123.

(5) Ante, 552.

merely

merely an officer of A. B. or C., but of all the inhabitants of the parish, he does." (1)

The pauper was a school-master, and officiated as school-master (2) in the parish of Melborne for ten years. During his continuance in the said school, Lady Betty Hastings conveyed by deed, inrolled, certain lands to trustees, and their heirs, to receive and pay the rents and profits *inter alia*, as follows: "Also the yearly sum of 10l. to the charity school of Melborne, in the county of Derby, to be paid to the vicar there, for the time being," which sum of 10l. the pauper received from the vicar of Melborne aforesaid, from the execution of the said deed, to the time of his death. By the court:—"A school-master is not an office, but only an employment; and what interest the pauper had in the school, whether for life, or otherwise, or how he was admitted to, or came to the employment, does not appear. The vicar is the person entitled to the 10l. *per annum*, and not chusing to teach the school himself, he paid it to this poor man as his deputy, which could not gain a settlement for any person whatever." (3)

2. School-master no office.

On the first of October 1766, the vicarage of the parish of Over was sequestered for three years, or till the bishop should release the same. On the twelfth of October aforesaid, the pauper was ordained deacon, to supply the cure during the sequestration. From the fifteenth of October aforesaid, to the fifth of June 1768, he performed divine service as curate, and resided in the parish of Acton, by exchange, with Mr. M. who paid him 5l. a-year for doing duty there, in addition to his salary of

3. Curate of sequestered living.

(1) Per Lord Kenyon, C. J. Rex *v.* Whittlesea, 4 Term Rep. 817. ante, 553.

(2) In the charity-school; see the report, 1 Wils. 87.

(3) Rex *v.* Melborne, Burr. S. C. 244.; from whence the case is here stated. 1 Wils. 87. S. C. from which the opinion of the court is given.

35l.

35l. a-year, which was paid him by the churchwardens, who were the sequestrators of Over, until the first of October 1769, when the sequestration ended. From June 1768, to the first October 1769, the pauper did the duty as curate at Over, and resided there; but it did not appear that he had any licence to the curacy of Acton. Lord Mansfield:—"There is no colour for considering this as an annual office: it is no office at all." Aston J. —"You cannot call it an annual office, when the sequestration may be determined at any time." (1)

3. Mode of appointment immaterial.

3d. As it is unnecessary that the office should be of a parochial nature, it is equally so that the appointment should be in the parishioners.

Instances.

Thus, the collector of duties on births and burials appointed by the crown (2); a constable put in by the leet (3); a tithing-man by the steward of a leet (4), or by the jurors (5); the clerk of the parish appointed by the parson (6); a sexton elected at a vestry by the proprietors of seats in the church or chapel (7), have been held to acquire settlements by serving these offices.

4. Must be annual.

4th. The office must be annual; that is, the person appointed into it must be liable to execute the duties for a year at least.

Tithing, serving half yearly by custom.

The sessions found, that by a custom in the hundred of P. in which the parish of C. lies, the occupiers of small tenements serve the office of tithing-men for half a year

(1) Helsington *v.* Over, Burr. S. C. See ante, Rex *v.* Wantage, 553. (2)

(2) Bisham *v.* Cook, ante, 552. (9).

(3) Per Powel, J. Gatton *v.* Milwich, ante, 552. (1).

(4) Holy Trinity *v.* Garsington, ante, 552. (5).

(5) Rex *v.* All Cannings, ante, 552. (6).

(6) Gatton *v.* Milwich, ante, 552. (1), and see St. Maurice *v.* St. Mary Kallendar, Burr. S. C. 27. post. 557. (5).

(7) Rex *v.* Liverpool, ante, 477. (2).

only

only at a time. The pauper served this office for one half year; and after an interval of twenty years, for another: he gained no settlement; for by "the custom here stated, it is no annual office." (1)

But it is not necessary that the office should be strictly annual, *i. e.* limited in duration to a year. A freehold office for life, as of sexton (2), or parish clerk (3), are public annual offices within the act. May be longer than yearly.

5th. The office must exist within the parish where the party resides but it may extend beyond it). Thus, a constable of a city, consisting of several parishes, the duties of the office being to be executed through all parts of the city, gains a settlement in the parish where he resides (4). The warden of a borough, exercising the office in the parish where he claimed a settlement, and in some others, gains a settlement. (5) 5. Must exist in the parish. 6. May extend beyond it.

So a person was elected sexton to the church or chapel of St. James, which, with part of the church-yard, stands in the parish of Walton, and the other part of the church-yard in the parish of Liverpool; but no corpse was ever buried in that part of the church-yard in Liverpool parish whilst the pauper executed the office, although they are since. The inhabitants of Liverpool attend the church of St. James in a large proportion, and the sexton resided in Liverpool. Lord Kenyon C. J. "The church-yard lies in two parishes, part of the office of the sexton consists in digging graves; he gained a settlement in that in which he resided." (6) Sexton of chapel.

(1) Cold Ashton *v.* Woodchester, Burr. S. C. 444. See also Rex *v.* Bow, 8 Term Rep. 445.

(2) Rex *v.* Liverpool, ante, 552. (2).

(3) Gatton *v.* Milwich, ante, 552. (1), and the opinion of Aston, J. Helsington *v.* Over, ante, 556. (1).

(4) St. Maurice *v.* St. Mary Kallendar in Winchester, ante, 557. (6).

(5) St. Mary *v.* St. Lawrence in Reading, ante, 557. (6).

(6) Rex *v.* Liverpool, ante, 552. (2).

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7. But need not extend over it. Tithingman in part of parish.

The office need not extend over the whole parish.

Thus, a tithing-man, whose tithing did not extend over the entire parish, but comprehended the part wherein he resided (1). The bailiff, or aletaster of a borough, which borough was not one fifth or sixth part of the parish, acquired settlements. (2)

SECT. II.

Of the Election, Service, and Residence.

1. Of the election. Must be legally placed in it.

THE 9 and 10 W. III. c. 11. expressly requires that a person residing under a certificate shall be legally placed in the office to gain a settlement; while the 3 & 4 W. III. c. 11. refers merely to the party's executing the office in fact, and is silent as to the manner in which he may obtain possession.

Borsholder, evidence of his appointment, insufficient.

J. H., while residing under a certificate, was told by his wife, on his return home, "that a person, whom he knew to be borsholder of the borough of W. in the parish of W. left a wooden tally for him, at his house, as a token that he J. H. had been chosen, at the court-leet held for the manor, borsholder for the borough of W.; but she had burnt the tally before his return home." I. W. was not present at the court-leet, nor did he know, of his own knowledge, that he was chosen borsholder; and no record, or presentment of the jury of the leet, or any other evidence of his appointment or election, except what his wife told him, was produced at sessions. It appeared, that he never took the oath of office, but that, within the year after, his wife had told

(1) Fittleworth *v.* Pullborough, 2 Bott, 167. Pl. 213.

(2) Rex *v.* Whitchurch, ante, 552. (10); and see Wingham *v.* Sellinge, Burr. S. C. 223.

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him the tally had been left at his house, he executed one warrant of a justice of the peace for the county, directed to the borsholder of the borough, and for the year was willing and ready to execute the office. Lee C. J.—"The act requires a legal placing in an annual office. It is stated, negatively, that there was no presentment, no admission, nor swearing; so that here is no foundation for supporting a legal placing. The evidence of being told of the tally is nothing that can merit any regard. The evidence of the legal placing in the office is found in the negative; for as no presentment was offered in evidence, we must take it that there was no presentment at all." (1)

Constable not presented according to the custom.

Also under 3 & 4 W. III. c. 11. in a place where it is an immemorial custom to present all constables to serve for the tithing at the manor court-leet, one who was sworn into the office, but never presented at any court-leet, was held not to gain a settlement. (2)

Swearing into the office, when sufficient.

But it seems, that where swearing into the office is necessary, and a person who resides under a certificate is appointed, and serves his year, he is legally placed therein, although not sworn until half the year is expired. (3)

2. Of the service. Degree of service immaterial.

When the officer is properly appointed, the actual service performed in the parish seems immaterial under either statute (4). It is sufficient, if he is ready to do his duty when called upon.

But a great difference seems to exist between the statutes 3 & 4 W. III. c. 11. and 9 & 10 W. III. c. 11. as to the service which is to confer a settlement.

(1) Wingham *v.* Sellinge, Burr. S. C. 223.

(2) Rex *v.* Winterbourn, Burr. S. C. 520.

(3) Holy Trinity *v.* Garsington, ante, 552. (5); and see St. Maurice *v.* St. Mary Kallendar in Winchester, 2 Bott, 158. Pl. 203. Fittleworth *v.* Pullborough, ib. 167. Pl. 213.

(4) Rex *v.* Liverpool, under 3 & 4 W. III. ante, 552. (2).

Under

Deputy gains no settlement.

Under 3 & 4 W. III. a deputy gains no settlement by serving the office (1), for the act requires that he shall execute it for himself and on his own account.

Constable legally placed in office, but serving on another's account.

Even where the person is appointed to the office as principal, and not as deputy, he gains no settlement if he is placed there, and serves for, and on account of another.

T. P. whilst he lived in Putney, was, at a court leet, sworn tithing-man for the manor and parish in manner following: "The jurors present to the office of tything-man for the year ensuing M. J. A. who, by leave of the court, puts in his place T. P. and he is sworn." T. P. served the office, but J. A. whose turn it was to furnish a tithing-man, paid all his expences attending the execution thereof. Lord Mansfield:—"The question is, whether the pauper served this office for himself, and on his own account, or not? The question is not, how he was presented to it, but how he served it. M. J. A. was the person in turn to furnish a tything-man, and he, by leave of the court, puts this man, a day-labourer, in his place, and paid him all the expences attending the execution of the office, and A. received the benefit of it, by being discharged of his obligation to serve in this, his turn, therefore he served for A. It is true, that A. was not liable for his misconduct, for he was not deputy to A., but yet it is clear that he executed the office for A., and not for himself, and on his own account, according to the meaning of the act of parliament." Aston J.—"This man appeared to have served for A. and not to have executed the office for himself, and on his own account. Though he was indeed so far the legal officer, that he might have had a good defence upon an information in nature of a

(1) Lothsome *v.* Sheriffhales, 19 Maurice *v.* St. Mary Kallendar, Vin. Abr. 379. Per Lee, J. St. Burr. S. C. 34.

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quo warranto, brought against him for executing the office, yet it don't follow that he executed it for himself, and on his own account, within the intent and meaning of this act." (1)

Service by deputy.

But on the other hand, where a certificate man serves an office by deputy, he gains a settlement under 9 & 10 W. III. c. 11. (2). A certificated person was chosen, and sworn in petty constable of the parish certified to, after being sworn in he declared he would not serve it himself, and he employed a deputy to serve it for him, to whom he gave half a guinea for his trouble. He was held thereby to gain a settlement, so as to enable his apprentice to acquire one by service with him in that parish. (3)

Service must be for entire year.

The service must be for one whole year. The pauper was chosen a tithing-man at a court-leet, and continued to execute his office for five months, when becoming chargeable to the parish, an order of removal was made and executed, and the Court were of opinion, that he was well removed, and gained no settlement. (4)

The pauper, at a court-leet holden by adjournment for the manor and borough of C. *on 16th November* 1792, was appointed to the office of aletaster of the borough, and duly sworn, according to the custom of the manor,

(1) Rex *v.* All Cannings, Burr. S. C. 634. ante, 556. (5).

(2) Per Lee, J. St. Maurice *v.* St. Mary Kallendar, Burr. S. C. 34.

(3) Rex *v.* Hope Mansell, Cald. 252. But a deputy is, in several instances, an independant officer.

(4) Fittleworth *v.* Pullborough, Burr. S. C. 238. The pauper here resided under a certificate, by virtue of 8 & 9 W. III. c. 30. and 9 & 10 W. III. c. 11. But Lee, C. J. observes; "the 3 & 4 W. & M. differs from this act; yet it would be odd to place him (the certificated pauper) on a different footing from other paupers who are to gain settlements by the exercising annual offices, and that is, for, and during a year,"

to execute the said office for one year then next ensuing, or until he should be lawfully discharged from the same. He accordingly entered upon and executed such office, *until* 1*st November* 1793, when at a similar court holden by adjournment, a new officer was appointed in his stead, and sworn in the same manner. He gained no settlement, for the words of 3 W. III. c. 11. s. 6. are to be construed according to their plain and obvious meaning; and he did not serve "a whole year." (1)

3. Of the 40 days residence.

It seems as if there must be a residence of forty days, at least, in the parish in which the office is executed (2) and the settlement claimed. No case has come before the court upon this subject, although some may be conceived which might give rise to discussion. It is undetermined, therefore, whether a residence of forty days is sufficient, or whether the party should reside for the whole year? If the former is sufficient, which a residence at different periods will connect? Or, supposing the pauper to reside the first forty days after his appointment in A. where his office or charge is to be executed, and then to remove into some other parish, but still discharging the duties of his office in A. during the remainder of his year, whether he would thereby gain a settlement in A.?

(1) Rex *v.* Bow, 1 Term Rep. 245.

(2) In St. Maurice *v.* St. Mary Kallender, as reported, 2 Const. 158. Pl. 213. Lord Hardwicke is made to say, "that the court construed the words *in the said town or parish*, not as importing an office in the town or parish, but more largely any office while the person remains in the same town or parish."

The report of the case, in Burr. S. C. 27. has no such observation; and the words of both statutes require, that he shall execute the office in such parish. See the opinion of Lee, C. J. Fittleworth *v.* Pulborough, 2 Const. 172. Pl. 226. Where one was appointed sexton by the proprietors of a church or chapel, which, with that part of the church-yard in which burials were had, was situate in the parish of W., and another part of the church-yard was situated in L. where the pauper resided, he gained a settlement in L. Rex *v.* Liverpool, 3 Term Rep. 118. ante, 559. (4).

If any analogy exists between this species of settlement, and those by apprenticeship, hiring and service, or residence upon a rented tenement of 10l. *per annum*, or upon a man's own estate, the points are decided as to them.

SECT. III.

Of the Proofs necessary to establish this Settlement.

Proofs necessary.

It will be necessary to prove, 1st, that the office is annual, of a public nature, and to be executed in the parish. 2d, That the party was placed therein (1). 3d, That he served for the whole year. 4th, The residence.

1. Nature of office. 2. Common law officers.

1st, As to the kind of office. Some are known to the law, so as to make it unnecessary to give evidence of their nature and duties. Such is that of constable, which exists by common law; collector of the land-tax, which is created by statute. (2)

2. Of a local nature.

But offices of a local nature either depend, 1st, upon charter or grant, which should be produced, if in existence; or, 2d, upon immemorial usage, when it may be shown by the courts rolls of the manor (3), or an ancient customary of the place (4), or by entries in the parish books (5), or by persons who are acquainted with the duties, from having seen them claimed and exercised.

(1) Quære under 3 & 4 W. III. c. 11. see ante, 560.

(2) See Bisham *v.* Cook, 2 Const. 167. Pl. 210. The collector of duties on births and burials appointed by 6 & 7 W. III. c. 6.

(3) Ratcliffe *v.* Chaplin, 4 Leon. 242.

(4) Denn *v.* Spray, 1 Term Rep. 466. Edwin *v.* Thomas, 1 Vern. 489.

(5) Stead *v.* Heaton, 4 Term Rep. 669.

2. The party's title to it.

2d, It remains to be decided, whether, in appeals respecting settlements of this kind, the pauper should prove a regular title to the office, as he must do, if it be questioned in an information in the nature of a *quo warranto*; or whether, acting in the office, does not confer a settlement under 3 & 4 W. & M. c. 11. or at least amount to *prima facie* evidence of a legal appointment (1), not only under that act, but under 9 & 10 W. III. which expressly requires, that the person should be legally placed in the office to obtain one.

In the case of a certificated person, where a presentment of the jury of the leet was necessary to the appointment of a borsholder, and no record or presentment was offered in evidence, Lee, C. J. observed, "as no presentment *was offered* in evidence, we must take it, that there was no presentment at all(2);" and upon an indictment against churchwardens for refusing to join with the overseers in making a poor rate, Pratt, C. J. held, that an appointment of the overseers, under the hands and seals of two justices, must be produced; for the court is to judge whether it be sufficient. (3)

Proof of local custom.

Such proof seems necessary in all cases where the mode of appointment depends upon local custom, and although it may be unnecessary in others, it is at least the safest mode of proceeding to adduce it.

Copies of records, and public instruments.

Wherever the appointment depends upon a record, or written instrument, either the original, or an examined sworn copy, should be produced in evidence.(4)

(1) See the opinion of Buller, J. Berryman *v.* Wise, ante 535.

(2) Wingham *v.* Sellings, Burr. S.C. 223. (2).

(3) Rex *v.* Arnold, 1 Str. 101. If the overseers had been indicted, proof of their having acted, would have been sufficient, *supra*, n. (1).

(4) For the law respecting copies under seal, which have little, if any reference to the present subject, see Bull. L. N. P. 226.

The

When evidence.

The principle which regulates the admission of copies of public instruments is thus laid down by Lord Holt, C. J.—"That wherever the original is of a public nature, and would be evidence, if produced, an immediate sworn copy thereof will be evidence (1);" because, since these matters lie for the public satifaction, every man has a right to their evidence, and in several places they cannot be at the same time. (2)

What copied.

Where a sworn copy is given in evidence, it must contain a copy of the whole instrument, for the precedent or subsequent words or sentence may vary the sense. (3)

How proved.

In order to let in the evidence of a copy, it must be proved on oath to have been duly examined. This is done by some person, usually the officer, who has the custody of the instrument, reading it over while the witness peruses the copy, and afterwards by the officer reading the copy while the witness holds the original, and observes whether it corresponds therewith.

Circumstances attending the appointment which depend not upon custom, or written documents; such as the swearing in of the officer, &c. are to be proved by oral testimony. (4)

(1) Lynch *v.* Clarke, 3 Salk. 154. Doug. 593. Bull. L. N. P. 228. ib. 247. 12 Vin. Abr. (A. b. 26) Tillard *v.* Shebbeare, 2 Wils. 366. Birt *v.* Barlow, Doug. 171. Rex *v.* Lord George Gordon, ib. 593.

(2) Gilb. Law of Evid. 3d Ed. 48. As to when copies of private instruments are admissible in evidence, see ante, 543. et seq.

(3) Bull. L. N. P. 228. 3 Inst. 173. But this only means, that an entire copy should be given of what relates to the subject-matter; ex. gr. If an entry in the manor books, or copyhold rolls is relied upon, a complete copy of that particular entry must be proved, and not of the entire book, or rolls, see Bull. L. N. P. 228.

(4) Ante, Vol. i. 436. et seq.

This

3. Proof of serving appointment.
4. Of residence.

This proof, as also that of serving the office and residence, depend upon the same rules as the establishment of any other fact necessary to any other kind of settlement. (1)

(1) Ante, 432. Ib. 530.

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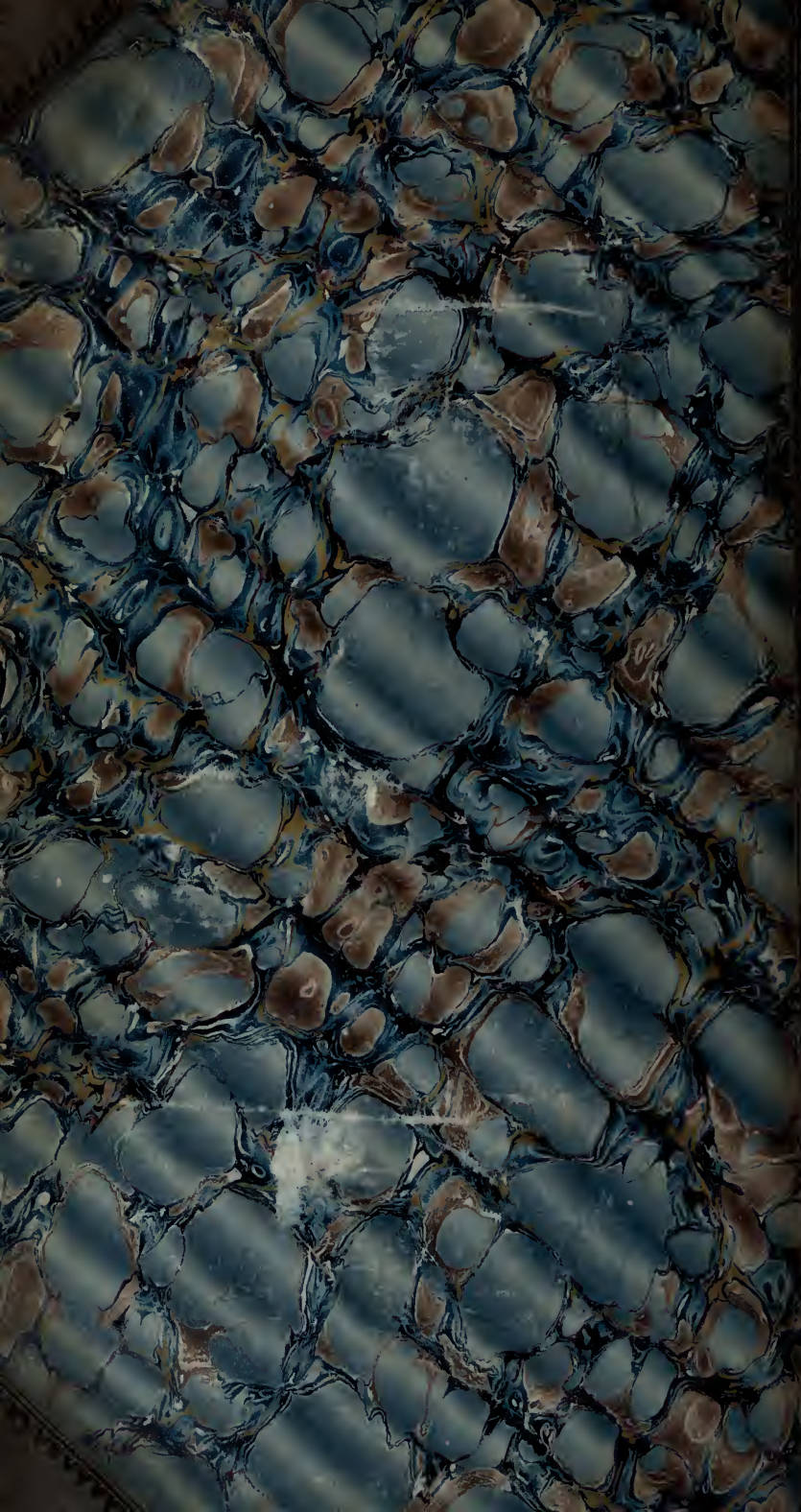
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